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MASSACHUSETTS REPORTS

119

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS

OCTOBER 1875—MARCH 1876

JOHN LATHROP
REPORTER

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JUDGES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. HORACE GRAY, CHIEF JUSTICE.
HON. JOHN WELLS.
(Died November 23, 1875.)
HON. JAMES D. COLT.
HON. SETH AMES.
HON. MARCUS MORTON.
HON. WILLIAM C. ENDICOTT.
HON. CHARLES DEVENS, JR.
HON. OTIS P. LORD.
(Appointed December 21, 1875.)

ATTORNEY GENERAL.

HON. CHARLES R. TRAIN.

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FOR the sake of securing greater promptness of publication, the Reporter has printed the cases in the order of decision, without reference to terms of court; and has indicated, in a line at the head of each case, the county in which it arose, the dates of the argument and judgment, and the judges present. When only one date is so given, the case was argued and determined on the same day.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

OLD SOUTH SOCIETY IN BOSTON *vs.* URIEL CROCKER & others. ATTORNEY GENERAL *vs.* OLD SOUTH SOCIETY IN BOSTON.

Suffolk. June 22. — Oct. 23, 1875. GRAY, C. J., did not sit. AMES, J., absent.

A gift for the erection of a house for public worship, or for the use of the ministry, may constitute a public charity, if there is no definite body, for whose use the gift was intended, capable of receiving, holding and using it in the manner intended. But when there is a body, or a definite number of persons, ascertained or ascertainable clearly pointed out by the terms of the gift to receive, control and enjoy its benefits, it is not a public charity, however carefully and exclusively the trust may be restricted to religious uses alone.

In 1669, land was conveyed to certain persons named "and to such as they shall associate to themselves, their heirs and successors forever, for the erection of a house for their assembling themselves together publicly to worship God, as also the erection of a dwelling-house for such minister or ministers as shall be by them and their successors from time to time orderly and regularly admitted, for the pastor or teacher to the said church or assembly, and for the accommodation of the said dwelling-house for the use of the minister or ministers as shall from time to time be chosen as aforesaid, and for the accommodation of the meeting-house, with convenient passages of ingress, egress and regress for the people, that shall there from time to time assemble as aforesaid, and for no other intent, use or purpose whatsoever." In 1677, the same grantor, by a deed reciting the preceding conveyance and the building of a meeting-house on the land by the grantees, conveyed an adjoining piece of land to the six survivors of the persons named in the preceding deed, "and to such as they shall have associated unto them in church fellowship, or shall be associated to them and to their heirs and successors forever, for the ends and purposes in the first above mentioned deed is fully and amply declared," "with the house already erected thereon for the use of their ministers

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or ministry orderly chosen by the said society, being the Third Church of Christ in Boston, from time to time and at all times forever." Both of these deeds were for a voluntary consideration. Subsequently, the grantor by her will gave to the "Third Church of Christ in Boston" her dwelling-house which adjoined the land before conveyed, "for the use of the ministry in the said church successively forever." The deeds and other writings concerning said house were by the will bequeathed to two of the persons named in the preceding deeds, as trustees for the said church, "for the end and use before declared." In 1845, the proprietors of pews in the church and their successors were made a corporation and authorized to take and hold, to the use of the corporation and its successors and assigns in fee simple, the property held by the church, "for the support of public worship, for parochial and charitable purposes in this Commonwealth, and for paying the debts of said corporation." *Held*, that neither the deeds nor the will created a public charity. *Held, also*, that the declaration of uses in the statute did not define a public charity, and that it was not the intention of the Legislature to so merge the interests of the trustees and the *cestuis que trust* as to discharge the estate from the trusts. *Held, also*, that lands so held might be sold by authority of the Legislature or of this court as a court of equity. *Held, also*, on a bill in equity praying for the sale of the property, and the application of the proceeds to the same trusts in another part of the city, that the vote of a majority of pewholders or members of the society was not of itself a sufficient authority to enable the corporation to make a sale, nor a sufficient reason to justify this court in authorizing it to be made; and that it was incumbent upon those who sought to make the change to satisfy the court that it was reasonably required for the accommodation of the society as a whole, and that the proposed change would not subject the minority to an unreasonable sacrifice of interest or convenience, or in any way work injustice to them.

THE FIRST CASE was a bill in equity by the Old South Society against Uriel Crocker, Osmyn Brewster, David Buck, Jacob Dresser, Joseph Ballard, Simon G. Cheever, E. C. Milliken, Harriet Gray, Ellen Gray, Elizabeth Coverly, Mercy Jellison and Abigail Armstrong, members of said society, alleging as follows:

On or before April 1, 1669, Captain Thomas Savage, William Davis and others joined themselves together and formed a "church of Christ," for the purpose of the public religious worship of God in the town of Boston, with the purpose to erect a meeting-house, wherein the said church might assemble themselves together publicly to worship God.

For the purpose of aiding in the establishment of and maintaining such church, Mary Norton, widow of John Norton, did, on April 1, 1669, "for divers good causes and considerations, mee thereunto mooving, and more especially for and in consideration of that indeared affection that my late dear husband in his life time

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did beare, and my selfe doe beare unto his and my assured friends, Captaine Thomas Savage, Capt. William Davis, Mr. Hezekiah Usher, Mr. Edward Rawson, Mr. John Hull, Mr. Peter Olliver, Mr. Josiah Scottow, Mr. Edward Raynsford, Mr. Richard Trewsdall, and Mr. Jacob Elliot, all of the said Boston, and in confidence of their faithfulness to performe that trust which I shall repose in them," make a deed of conveyance or trust, wherein she conveyed a certain portion or strip of land, the same being a part of her homestead lot or garden, and being situated on the corner of what is now called Milk and Washington Streets, in Boston, and being the land substantially now occupied by the old meeting-house and the block of stores on Milk Street, to the persons above named, "and to such as they shall associate to themselves, their heires and successors forever, for the erecting of a house for their assembling themselves together publiquely to worship God, as also the erecting of a dwelling house for such Minister or Ministers as shall be by them and their successors from time to time orderly and regularly admitted for the Pastor or Teacher to the said Church or Assembly, and for the accommodation of the said dwelling house for the Minister or Ministers as shall from time to time bee chosen as aforesaid, and for the accommodation of the Meeting House with convenient passages of ingress, egress and regress for the people, that shall there from time to time assemble as aforesaid, and for noe other intent use or purpose whatsoever."

Thereupon the said Thomas Savage and others proceeded to erect a meeting-house, and a dwelling house for their minister, and said church of Christ was duly organized, and adopted the name of "The Third Church in Boston."

The said church and its minister entered upon and took possession of the land so given, and occupied the same for a long time for a church, and dwelling-house for the minister of the church.

On June 30, 1677, the said Mary Norton by a deed, reciting the conveyance in the preceding deed, the building of a meeting-house by Savage and others, and their repairing the grantor's house and building an addition to it for a habitation for a minister at her desire, and her promise to give them the land on which they built, conveyed to said Savage and five others, the survivors of those before mentioned, "and to such as they have

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associated unto them in church fellowship, or shall be associated, to them and to their heirs and successors forever, for the ends and purposes in the first above mentioned deed of April the first, 1669, is fully and amply declared," a certain additional piece of land upon which they had before built an addition to the minister's house, being the land under said addition, "for the use of their Ministers or Ministry orderly chosen by the said Society being the Third Church of Christ in Boston from time to time and at all times forever."

The will of Mary Norton, dated August 20, 1677, contained the following, among other clauses:

"*Item.* I give and bequeath unto the Third Church of Christ in Boston, my now dwelling house, with all the land belonging to the same, as it is situate near the Third Meeting House in Boston aforesaid, with all profits, privileges, rights, and appurtenances whatsoever to the same belonging or appertaining, for the use of the Ministry in the said Church successively forever. And my will further is, that the said Third Church, or some person or persons in their behalf, shall be possessed of the said House and Land, with the rights and appurtenances, at and immediately after my decease, for the reasons following: First, Because many of the particular members of the said Third Church have been large contributors to that Meeting House and Church treasure, from whom they issued. Secondly, Because of the great charge that the brethren of the said Third Church have been at in building their meeting house. Thirdly, Because I conceive it will prove inconvenient for a minister to live so near a meeting house where he doth not preach: Provided, alway, that the said Third Church, or some person or persons in their name and behalf, pay or cause to be paid unto the first Church of Christ in Boston, the full and just sum of one hundred pounds of lawful money of New England within the space of one year next after my decease; and my will is that the payment of the said sum and tender thereof, be made at or in my now dwelling house.

"*Item.* I give and make over by these presents all my deeds and other writings that concern my said house and land in said Boston, unto Capt. John Hull and Mr. Jacob Elliot, all of Boston aforesaid, as Trustees for the said Third Church of Christ in Boston, for the end and use before declared."

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Savage and others from time to time associated unto themselves various persons as composing the Third Church, and in that capacity took possession of and occupied said lands, and were and became seised in fee simple thereof, and were the managers of all the property of said church.

In 1729 the said church proceeded to remove the old meeting-house and erect a new one; and in the new meeting-house those who had associated themselves together as the successors of Thomas Savage and others purchased pews, and the same were conveyed to them by the officers of the church, and the pew proprietors in the meeting-house, which at this time was called the Old South Meeting-house, were and became the associates and successors of Thomas Savage and others, to whom the said estates had been conveyed and devised.

At about that time the church, which had formerly been called and named the Third Church in Boston, and afterwards by reason of its situation the South Church, now began to be called the Old South Church, and the house where the church and congregation assembled together for public worship was called the Old South Meeting-house, and has been so called ever since, and the plaintiff claims and believes that the name was legally changed from the Third Church to the Old South Church, and that the Old South Church is the legal successor of the Third Church, and that the pew proprietors, as constituted at the time of the building of the church in 1729, were the regular and duly constituted successors of Thomas Savage and others, and that the lands described in said deeds and will were duly and properly vested in the pew proprietors in the Old South Meeting-house until the year 1845.

By the St. of 1845, *c.* 229, the proprietors of pews in the Old South Meeting-house were made a corporation by the name of the Old South Church in Boston, (which name was subsequently, by the St. of 1859, *c.* 88, changed to the Old South Society in Boston,) with all the powers and privileges, and subject to all the duties and liabilities contained in the Rev. Sts. *cc.* 20, 44; and by said act said corporation was authorized to take and hold to the use of said corporation and its successors and assigns in fee simple, all and singular that parcel of real estate situate on Milk, Washington and Spring streets, with authority to demise and lease all or any of its real estate, except the meeting-house and land under the same.

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In 1800, the then pew proprietors caused the ancient house of Mary Norton to be removed, and in the place thereof erected a block of stores on Washington Street, which ever since have been let, and the income thereof applied to the paying the debts and expenses of the society and to the support of the public worship of God in the city of Boston and for charitable and parochial purposes; and afterwards, in the year 1845, the society removed the pastor's house on Milk Street, and in the place thereof erected a block of stores, which have been leased, and the income thereof applied for the purposes aforesaid; and afterwards the society let for business purposes the chapel owned by them, situated on Spring Lane and upon land, a part of which was originally given by Mary Norton, and a part acquired by purchase. So that at the annual meeting of the corporation in the year 1869, the entire land owned by the society, nearly all of which had been given by Mary Norton, was, with the exception of the land and yard occupied by the meeting-house, entirely occupied by stores, &c., for business purposes, and the income arising therefrom was entirely used for paying the debts and expenses of the society, and for parochial and charitable purposes.

At the meeting of the pew proprietors held in April, 1869, after due consideration, and for reasons that seemed good to the members of the corporation, a vote was passed looking towards the procurement of a piece of land upon which to build at some time a new meeting-house, which vote was followed by a series of votes and acts of the corporation, which resulted in the purchase of a lot of land and the erection thereon of a chapel and dwelling-house for the minister.

By reason of the great fire in November, 1872, the society abandoned the old meeting-house as a place of worship, and regularly worshipped in the chapel occupied by the said Old South Society; and about that time it was applied to by the United States Government to lease the meeting-house for a post-office. The corporation voted so to do, provided their charter should be so amended that it could be done. And, upon application to the Legislature, by the St. of 1872, *c.* 368, the charter was amended so that the corporation could so lease the meeting-house, provided the pew proprietors should vote so to do On December 20

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1872, the pew proprietors, being called together for the purpose, voted so to lease the meeting-house, and at the same time voted to proceed at once to erect a new meeting-house, and the treasurer was authorized to borrow large sums of money to pay for the building of the same.

At a subsequent meeting held in April, 1873, at the regular annual meeting, it was voted to abandon the old meeting-house as a place of worship, and the new chapel and meeting-house were declared to be the regular place of worship. And since the last Sunday in April, 1873, the Old South Society and the Church have occupied and exclusively used the new chapel, as their regular place of meeting for the public worship of God.

In the construction of the buildings above described, upon the corner of Dartmouth and Boylston streets, the society has incurred large expenses, and has been compelled to borrow large sums of money, and is now indebted for money borrowed for said purpose, and for contracts made for the building and completion of the meeting-house, to an amount not far from $450,000; and by repeated votes of the society and church it has been determined, after due deliberation and for good reasons, that the new chapel, and meeting-house when it should be finished, should be the future and permanent place of worship of the Old South Society and Church; and in accordance with this purpose and intention, they have had the pews in the old meeting-house duly appraised, have voted to sell, and have directed and ordered the standing committee to proceed at once and sell the meeting-house and land under and adjacent to the same, and to use the proceeds to pay the debt and liabilities already incurred, and for parochial and charitable purposes.

All these votes, acts and doings have been done after full and public notice in accordance with the by-laws, and with the full consent and advice of the ministers of the church and the deacons and officers thereof, and, as the plaintiff believes, of a large majority of the members and regular attendants of the Old South Church. These acts and votes have extended over a long period, and it has ever been claimed by the corporation, and, before its organization, by the pew proprietors of the Old South Meeting-house, that the land above mentioned was held by them in fee simple, without condition or limitation, and they have ever used

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and employed the same for the purpose of accomplishing the evident and manifest purpose of the gift, namely, the public worship of God, and the extending and increasing the usefulness and influence of the Third Church, now the Old South Church in the city of Boston. To that end the houses of the ministers, at their request and with their consent, have been removed from the business street to the streets where the citizens are accustomed to dwell, and now the old meeting-house being situated at a great distance from the dwellings of most of the pew proprietors, and in that part of the city unoccupied by any dwellings, in order to carry out the principal purpose of Madame Norton, after due deliberation the plaintiff has decided and voted that the best interests of the church and society require that the place of worship should be removed to the land recently purchased on the corner of Dartmouth and Boylston streets, and that the old meeting-house and the land adjacent thereto should be sold and the proceeds used as before stated.

In 1874, the plaintiff petitioned the Legislature for such an amendment of its charter that the meeting-house might be leased to others besides the United States Government, and that all restrictions in that regard should be removed; and the Legislature passed an act, a copy of which is printed in the margin.*

The pew proprietors above named, a small minority of the members of the corporation, thereupon contended that the land above described could, under the said deeds and will, be only used for a meeting-house and the ministers' houses; that, should the land on which the meeting-house stands be leased, demised or used for business purposes or sold, the same would be forfeited, and revert to the heirs of Madame Norton; that the aforesaid deeds and

* The St. of 1874, *c.* 270, is as follows: "In any suit in equity brought before the Supreme Judicial Court to obtain the sanction of the said court to a sale or lease or other transfer or disposition of the Old South Meeting-house and the land under and adjacent to the same, the said court shall possess and exercise the same powers and be governed by the same principles of equity law as if the said land had not been the subject of any special legislation concerning power to lease the same.

"The meeting-house shall not be leased or sold or in any way disturbed until authority therefor shall be obtained from said court; but this shall not prevent the restoration of the pews and other changes by the United States according to the terms of the existing lease."

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will created a trust, and that the corporation was the trustee, and that the use and improvement of the land aforesaid for any other purpose than for ministers' houses and a meeting-house would be contrary to the purpose, intent and letter of the trust created; and that any sale or other use of the property would be a violation of the trust; and any lease or deed of such land would pass no title and be of no effect.

The plaintiff contended that there was no condition or limitation annexed to the gift, and that any action it proposed would not work a forfeiture; that, if there was a trust created by the gift, the society as the trustee, with the church and the ministers as the *cestuis que trust*, after long and faithful trial, examination and deliberation, had decided that the Third Church, now called the Old South Church in Boston, could only preserve its power and influence, and even its existence, by removing its place of worship; that as in the lapse of time the church lot had become located in a business centre, and if used for business purposes would yield a large income or revenue, it was the proper duty of the corporation so to use the land, and expend the proceeds in that portion of the city where the citizens dwell; that by such use of the property the intent and purpose of Mary Norton would be accomplished; that such had always been the policy of the corporation and the pew proprietors, and in pursuance thereof they had erected stores upon a portion of the land, and had used the income arising therefrom for the purposes aforesaid; and that the defendants, having for so long a time allowed the corporation, of which they were a part, to so proceed, without any attempt to restrain it before any judicial or competent tribunal, and the corporation, having been at large expense and incurred very heavy liabilities, relying upon the business capabilities of this estate to defray them, they could not now in equity and good conscience complain.

The plaintiff is informed that the meeting-house will shortly be abandoned by the United States Government, and avers that the proper time has arrived to sell the meeting-house in accordance with the votes of the corporation to that end. But the defendants still claim and aver that the corporation has no power or authority to so dispose of the property, and that such sale is in violation of the trust, and contrary to the conditions of the gift.

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The plaintiff further alleged that the proposed sale was in accordance with the manifest intention and purpose of the donor, and that the defendants, by reason of their laches and acquiescence in all these acts for so long a time, and by reason of their being members of the corporation, could not now object; that the corporation has but one object, and that is to carry out and accomplish the purpose of the donor in her gifts and bequests; and that in order to accomplish the same, it was absolutely necessary to sell the land as aforesaid. And that the trust reposed in them could only be faithfully and properly executed by removing the meeting-house to some other place than the site of the old meeting-house on the corner of Milk and Washington streets, and that it could best be accomplished by selling the old building and the land under the same, and using the proceeds thereof to erect a church in the new locality.

The prayer of the bill was for a decree declaring: 1st. That the Old South Society has full power and authority to sell and convey the meeting-house and land under and adjacent thereto on the corner of Washington and Milk streets in the said city of Boston, and to give a valid title to the same. 2d. That under the deeds and will of Mary Norton there are no conditions, restrictions, limitations or trusts that will prevent the said society from giving a good and valid title to the whole or any part of the real estate given by her. 3d. That this religious society has a right to sell its meeting-house and land for the purpose of building a new meeting-house. The bill also prayed that the court would authorize and order the said meeting-house and land to be sold in accordance with the vote of the corporation, such sale to be made, and the proceeds arising therefrom to be applied to the purpose of building or paying for the building of a new meeting-house, chapel and minister's house, in the city of Boston, for paying the debts and betterments, taxes of said society, and for charitable and parochial purposes in the city of Boston, and for no other purpose; the purchaser of said property not to be responsible for the application of the purchase money; and for further relief.

Annexed to the bill were copies of the by-laws of the plaintiff corporation, and of the votes and records, referred to in the bill. These, being immaterial under the decision of the court, are omitted.

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The answer alleged that by the St. of 1845, *c.* 229, by which the plaintiff was incorporated, and by the terms of which it was authorized to take and hold the Old South Meeting-house, and the lands under the same, and the deeds and devise of said land set forth in the bill, the plaintiff has been constituted trustee of a public charity, and the estates described in said bill and held by the plaintiff are held by it subject to said trusts; that the plaintiff's bill prays the instructions of this court as to the sale of a portion of said trust estate and the application of the proceeds; that the duty of maintaining the rights of the people of the Commonwealth, and of such persons as may be interested in said charity, is vested in the Commonwealth, and that the attorney general should have been made a party to this suit; that the sale proposed in the bill and the application of the proceeds in said bill proposed are in violation of the provisions of the plaintiff's charter and of the trusts thereby created; and that this court is without authority to divert the said estate to the erection of the buildings referred to in the bill, or to modify a trust established by legislative enactment, by limiting the application of any surplus remaining after paying for such building to parochial and charitable purposes within the city of Boston.

The answer further alleged that no vote has been passed by said corporation authorizing an application to this court for the right to sell its meeting-house and land, or for instructions relating to its trusts; and that the filing of said bill and the affixing the name of said corporation thereto was unauthorized, and that the defendants ought not to be holden to answer to said bill, and that the same should be dismissed.

The answer then admitted the organization of a church by Savage and others, and the conveyances and devise by Mary Norton, but alleged that the land on which the church now stands was conveyed by said Norton to said Savage and others and their associates and successors, to build a church upon for their assembling themselves together publicly to worship God, and for the accommodation of such church, with convenient passages for the people that shall there from time to time assemble, and for the erection and accommodation of a dwelling-house for the pastor or teacher of said church, and for no other intent, use or purpose whatever.

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The answer also admitted that said Savage and others occupied said land and became seised thereof upon the conditions, and for the uses, and upon the trusts in said conveyances and devise set forth; that Savage and others built a church on said land, and the removal of the same and the building of the present church on the same site in 1729; and the incorporation of the plaintiff by the St. of 1845, *c.* 229; but alleged the ignorance of the defendants as to whether the proprietors of pews in said house in 1729 and subsequently were the associates and successors of said Savage and others, and whether the lands in said deeds and will described were vested in them; but averred that the premises conveyed and devised by Mary Norton were held by the successors of said Savage and others only upon the conditions and trusts in said conveyances and devise set forth.

The answer further alleged that the St. of 1845, *c.* 229, provided that the plaintiff should take and hold in fee simple the land before mentioned for the support of public worship, for parochial and charitable purposes in this Commonwealth, and for paying the debts of said corporation; but that said act prohibited the conveyance or lease of said meeting-house and land under the same.

The answer, after admitting the passage of the St. of 1872, *c.* 368, and the St. of 1874, *c.* 270, proceeded as follows:

"And the defendants say that the several alleged votes of the plaintiff subsequent to April, 1869, for the purchase of land and the erection of a chapel and meeting-house and other buildings, and the borrowing of money therefor, and the removal from its place of worship and the sale of its meeting-house, if passed, were in violation of the trusts on which the estate of the corporation is held, and of its charter; and the defendants deny that due notice of the objects of the meetings, at which action was had on said alleged votes, was given in accordance with the by-laws of said corporation; and they deny that said votes were passed by said corporation and after due deliberation, and allege that certain members of said corporation were unlawfully prevented from voting on said measures, and that votes of persons not members of said corporation were received and counted in favor of the several measures above named.

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"And they admit that large debts have been incurred in the name of said society, and that the amount of said debts and liabilities incurred in the purchase of the land and the erection of the buildings mentioned in the plaintiff's bill is not far from $450,000; and they further say that the expenditures made and liabilities incurred as aforesaid have been unreasonable and extravagant, and have been made and incurred in violation of the plaintiff's trust and of its charter, and have tended to the waste and destruction of said trust estate.

"And the defendants deny that the interests of said society have required or now require a removal from said meeting-house erected on the estate given therefor by said Norton, and allege that said meeting-house is situated in a central portion of the city and in the midst of a large population, and is well situated for the maintaining of public worship and carrying on the work of the church and society, and for fulfilling the trusts created by the donor and by the charter of the plaintiff and the several acts in amendment thereof.

"And the defendants say that all rights of pews in said Old South Meeting-house, and of membership in said corporation, have been acquired subject to the by-laws contained in the exhibits annexed to said bill and under the form of deed therein contained; and the defendants say that by reason of the several votes and acts set forth in the plaintiff's bill, and by the abandonment of said house as a place of public worship without complying with the conditions of said deeds, all rights to pews in said house, and to membership in said corporation of others than these defendants and certain other pewholders opposed to the sale of said house, who have not been made defendants to this bill, have been forfeited to said corporation.

"And these defendants say that they and the pewholders last above mentioned are the only members of said corporation, and are entitled to the sole control of its estate, subject to the conditions and trusts upon which the same is held.

"And the defendants deny that they have been guilty of any laches or acquiescence in any of the acts and votes of the plaintiff corporation as in said bill alleged, without this, that any other matter in said bill contained, material or necessary for these defendants to make answer unto, and not herein and hereby

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well and sufficiently answered, confessed and avoided, traversed or denied, is true to the knowledge or belief of these defendants."

The case was reserved by *Endicott*, J., for the consideration of the full court upon the pleadings, the deeds and will of Mary Norton, the several acts of the Legislature relating to the Old South Church and the Old South Society, the by-laws of the corporation, and the form of deed of pews under which all pews and rights of membership in the corporation have been held, and a report in substance as follows:

It appeared at the hearing that the authority for bringing the suit, if any, was the votes set forth in the exhibits, especially the vote of June 12, 1874, and passed by a vote of twenty-seven to thirteen, and the sanction of the standing committee of the society. It was contended by the defendants that on the above facts the bill should be dismissed for want of authority to file the same.

In January, 1873, the majority, against the protest of the defendants, leased the property to the United States Government, under authority of an act of the Legislature, and in April, at the annual meeting of the society, the new chapel on Boylston Street was declared the meeting-house, according to the vote set forth in the exhibit, against the protest of the defendants.

It further appeared that many persons voting with the majority have, under the above arrangement, attended regularly at the new place of worship at the chapel on Boylston Street, and have not offered their pews to the treasurer as provided in their deeds, which said deeds were in the form above referred to, and the defendants contended that they were thereby disqualified from voting after the annual meeting in 1873; and it appeared that if their votes had not been counted, a majority would have been opposed to the sale and to the several alleged votes subsequent to said annual meeting. It appeared that, except as above stated, the several votes set forth in the exhibits to the plaintiff's bill were passed by a majority of the persons present and voting at meetings of the corporation. There was no evidence, unless such alleged several votes of the society and the sanction of the standing committee to the bringing of this bill be so considered, that the sale of the meeting-house and the land thereunder was necessary or expedient, nor was there any other evidence offered that

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the society or the public would in any way be the gainer by the removal.

The defendants offered testimony to show that the old meeting-house is conveniently situated for public worship, and there is a large population in its immediate vicinity, and that it is easily accessible to a large number of persons beyond its vicinity; that the new meeting-house in process of erection is in a portion of the city where there are many other churches, and that the welfare of the society and the purposes of the trust require that the meeting-house should not be sold or removed. The question whether this evidence was admissible is reserved.

It also appeared that without the sale of the Old South Meeting-house the society would have money enough to pay five hundred thousand dollars, the full cost of the new meeting-house, chapel and parsonage, and have in addition an income of from ten to thirteen thousand dollars, which is as much as is usually appropriated for the support of public worship in similar churches in the city of Boston. The defendants offered evidence to show that the society had a sufficient fund to maintain public worship in the new meeting-house, without the sale of the old meeting-house, and that it is proper and expedient that the old meeting-house should be retained, in order that public worship may be maintained therein by the said society or the defendants and their associates; and the defendants offered evidence that they were ready, willing and able to maintain worship in said house, and desire so to do. The question whether this evidence was admissible is reserved.

The question whether the attorney general should have been made a party is also reserved, and all other questions of law raised by the answer, or upon the face of the plaintiff's bill, or upon this report.

If under the several deeds and acts of the Legislature the society should be authorized to make said sale under and in pursuance of said votes, without any other evidence of its necessity or expediency, or otherwise, and if none of the evidence offered by the defendants was admissible, and if this bill was properly brought and can be properly maintained without the attorney general, then a decree is to be entered accordingly. If on the other hand the court are of opinion that the suit cannot be main-

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tained without making the attorney general a party, the bill is to be dismissed, unless an amendment should be allowed by the court.

If the court are of opinion that any of the evidence offered by the defendants is competent, then the case is to be sent to a master. If, upon the case stated in the bill and exhibits and report, no sale can be legally made, the bill is to be dismissed.

THE SECOND CASE was an information filed by the attorney general on December 4, 1874, at the relation of the parties defendant in the first case, alleging that the Old South Society held the land conveyed and devised to it by Mary Norton as trustee of a public charity; that by the acts done by the defendant, all of which were set forth at length and were the same appearing in the first case, the defendant had violated its trust, and praying that it be restrained from selling its land, that it should be removed from its said trust and that other trustees be appointed in its stead.

An answer was filed, and the case was reserved by *Endicott*, J., for the consideration of the full court on the pleadings and a report similar to that in the first case.

B. F. Thomas & L. M. Child, for the Old South Society.

E. R. Hoar & G. O. Shattuck (*R. Gray* with them), for the defendants in the first case, and the attorney general in the second case. 1. The property sought to be sold is held to charitable uses. The object is charitable. Trusts for the support of public worship and religious instruction, either under a liberal construction of the words "repair of churches" in the St. 43 Eliz. *c.* 4, or by virtue of original equity jurisdiction, have always been held to be charities. *Earle* v. *Wood*, 8 Cush. 430. *Jackson* v. *Phillips*, 14 Allen, 539, 552. *Attorney General* v. *Pearson*, 3 Mer. 353. The object of the three gifts of Mary Norton, all of which were gratuitous, was the advancement of religion through the erection of a meeting-house for the public worship of God and supplying a dwelling-place for the minister thereof. Gifts to build a church are held charitable. *Dutch Church* v. *Mott*, 7 Paige, 77. *Beaver* v. *Filson*, 8 Barr, 327. *Schnorr's Appeal*, 67 Penn. St. 138. *Potter* v. *Thornton*, 7 R. I. 252. *Meeting St. Baptist Society* v. *Hail*, 8 R. I. 234. *Goode* v. *McPherson*,

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51 Misso. 126. *Johnson* v. *Mayne*, 4 Iowa, 180. *Scott* v. *Stipe*, 12 Ind. 74. *Hopkins* v. *Upshur*, 20 Tex. 89. *Davis* v. *Jenkins*, 3 Ves. & B. 151. So also are gifts to build a parsonage. *Sewell* v. *Crewe-Read*, L. R. 3 Eq. 60. *Cresswell* v. *Cresswell*, L. R. 6 Eq. 69. The gifts are to Thomas Savage and others "and to such as they shall associate to themselves, their heirs and successors forever." Any persons of the same religious views might become members of the society by buying pews in the church. The society could be no source of pecuniary profit to its members; and the fact that the members paid for their pews can be no objection to its being a charity. *Gooch* v. *Association for Aged Females*, 109 Mass. 558. *Gass* v. *Wilhite*, 2 Dana, 170.

The beneficiaries are sufficiently indefinite. It is only necessary that they should take by virtue of their position and not as individuals. A gift otherwise a charity will be none the less so because its benefits are confined to a class of persons who are represented at the time of the gift by certain definite individuals. Thus the following gifts are held to be charities, though there is no uncertainty as to the persons to be immediately benefited: A gift to a priest or minister, by virtue of his office. *Attorney General* v. *Cock*, 2 Ves. Sen. 273. *Thornber* v. *Wilson*, 3 Drew. 245; 4 Drew. 350. *Attorney General* v. *Dublin*, 38 N. H. 459. A gift to a lodge of Freemasons. *King* v. *Parker*, 9 Cush. 71. *Vander Volgen* v. *Yates*, 3 Barb. Ch. 242. *Duke* v. *Fuller*, 9 N. H. 536. *Indianapolis* v. *Grand Master*, 25 Ind. 518. A gift to a particular religious society. *Earle* v. *Wood*, 8 Cush. 430. *Dexter* v. *Gardner*, 7 Allen, 243. *Beatty* v. *Kurtz*, 2 Pet. 566. *Magill* v. *Brown*, Brightly, 346, note. *Williams* v. *Williams*, 4 Seld. 525. *Cammeyer* v. *United German Lutheran Churches*, 2 Sandf. Ch. 186, 237. *Banks* v. *Phelan*, 4 Barb. 80. *Wright* v. *Methodist Church*, Hoffm. Ch. 202. *Price* v. *Maxwell*, 28 Penn. St. 23. *Attorney General* v. *Dublin*, 38 N. H. 459. *Gass* v. *Wilhite*, 2 Dana, 170. *Curd* v. *Wallace*, 7 Dana, 190, 192. *Attorney General* v. *Jolly*, 2 Strob. Eq. 379. *White* v. *University*, 4 Ired. Eq. 19, 20. *Bridges* v. *Pleasants*, 4 Ired. Eq. 26, 31. *Johnson* v. *Mayne*, 4 Iowa, 180. *Ward* v. *Hipwell*, 3 Giff. 547. *Attorney General* v. *Gould*, 28 Beav. 485. A gift of land for the purpose, as in this case, of building a particular church. *Dutch Church* v. *Mott*, 7 Paige, 77, and other cases before cited. In

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the following recent English cases, legacies for the purpose of building a chapel or parsonage were assumed to be charitable, the only question being whether they came within the Mortmain Act, 9 Geo. II. *c.* 36. *Sewell* v. *Crewe-Read*, L. R. 3 Eq. 60. *Booth* v. *Carter*, L. R. 3 Eq. 757. *Cresswell* v. *Cresswell*, L. R. 6 Eq. 69. *In re Watmough*, L. R. 8 Eq. 272. *Sinnett* v. *Herbert*, L. R. 12 Eq. 201; *S. C.* L. R. 7 Ch. 232. *Pratt* v. *Harvey*, L. R. 12 Eq. 544. *In re Lee*, 21 W. R. 168; 27 L. T. (N. S.) 808.

Anonymous, 3 Atk. 277, and *Swift* v. *Easton Beneficial Society*, 73 Penn. St. 362, are sometimes cited as holding certain trusts not to be charities for want of indefiniteness, but they proceeded on other grounds. They are cases of societies in the nature of mutual insurance companies, where each member pays a regular assessment in consideration of relief in case of necessity or illness. They are no more charities than annuity offices or accident insurance companies. They are pecuniary enterprises, and the members make a pecuniary investment expecting to get their money's worth. Such societies may be and often are run at a profit and declare dividends. The legal objection is that their objects are not charitable within the St. 43 Eliz. *c.* 4. The same objection applies to a gift to a private school, (*i. e.*, not free,) as such schools are pecuniary enterprises, and intended to be run at a profit. *Attorney General* v. *Hewer*, 2 Vern. 387. *Attorney General* v. *Newcombe*, 14 Ves. 1. But it is no objection that a school exists for the benefit of a restricted class of persons. *Meeting St. Baptist Society* v. *Hail*, 8 R. I. 234. In *Carne* v. *Long*, 2 De G., F. & J. 75, the gift was to a body substantially a private library association, and hence not a charity. In *Thomson* v. *Shakespear*, 1 De G., F. & J. 399, the court declared that a museum to be established at Shakespeare's house in Stratford could not be brought under any of the classes of charities enumerated in the 43 Eliz. *c.* 4. In *Attorney General* v. *Haberdashers' Co.* 1 Myl. & K. 420, the Haberdashers' Company was held to be a trading company and not a charity. In all the foregoing cases the objection was that the object was not charitable, and not any lack of indefiniteness in the beneficiaries. *Thomas* v. *Howell*, L. R. 18 Eq. 198, is an example of a gift which fails as a charity for want of indefiniteness. The gift was to ten poor clergymen of the Church of England, to be selected by A. B.

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and was held not a charity, because it was a gift to individuals, and not a perpetuity. The ten clergymen, once selected, would take as individuals, and not by virtue of their office or position.

Every trust is either a charity or else a private trust, which must be limited within a life or lives in being and twenty-one years. So that gifts for the founding and support of Congregational churches in this Commonwealth, if not charities, would be void as perpetuities. *Jackson* v. *Phillips*, 14 Allen, 539, 550. *Odell* v. *Odell*, 10 Allen, 1, 6. *Dexter* v. *Gardner*, 7 Allen, 243. *Carne* v. *Long*, 2 De G., F. & J. 75. *Thomson* v. *Shakespear*, 1 De G., F. & J. 399. It seems that such gifts are perpetual trusts of some sort. *In re New South Meeting-house*, 13 Allen, 497. *Second Congregational Society* v. *Waring*, 24 Pick. 304. *Wheaton* v. *Gates*, 18 N. Y. 395. There appears to be no reason why a Congregational religious society should not be "technically charitable," that does not apply equally well to a lodge of Freemasons or a society of Friends. *King* v. *Parker*, 9 Cush. 71. *Earle* v. *Wood*, 8 Cush. 430. *Dexter* v. *Gardner*, 7 Allen, 243.

When the other requisites of a charity exist, the test is not in the definiteness or indefiniteness of the persons actually receiving a benefit at any one time, but in the intent of the gift. If the intent is to confer a benefit upon the public, or upon a large and indefinite portion of the public, such as a certain denomination of Christians, the fact that the fund is not large enough to benefit all at any one time will not prevent the gift being charitable.

The decision *In re New South Meeting-house*, 13 Allen, 497, is made clearer by calling the corporation a charity. The suggestion of Bigelow, C. J., in that case, that religious corporations form a third class of trusts which are neither private trusts nor public charities, but *quasi* public, has no foundation in authority. There is no case in this Commonwealth which decides that a gift to a Congregational church is not a charity. In *Attorney General* v. *Federal Street Meeting-house*, 3 Gray, 1, the decision is put distinctly on the ground that there was no gift, the grantor selling his land and receiving a pecuniary consideration from the society. *Attorney General* v. *Heelis*, 2 Sim. & Stu. 67, 77. The intimation that the beneficiaries of the trust were not sufficiently indefinite for a charity, is wholly immaterial to the decision.

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Religious corporations have been recognized as charities by the Legislature of this Commonwealth. Sts. 1809, *c.* 91, § 4; 1815, *c.* 12.

The Old South Society, so far as the deed is concerned, must stand upon the same ground as other religious societies in this Commonwealth which were founded by gift. And if it is for the public good that the worship of God should be maintained, public policy requires that such bodies should be charities. For, if not charities, there is nothing to prevent them from changing themselves by a unanimous vote into trading corporations, from declaring dividends or dividing up their entire property among their members. If any of these things were done, supposing churches not to be charities, the Commonwealth could not interfere through the attorney general, nor could any private person call them to account, as all interested, both trustees and *cestuis que trust*, would have consented to the act. *Attorney General* v. *Federal Street Meeting-house*, 3 Gray, 1, 60, 61. *Wheaton* v. *Gates*, 18 N. Y. 395, 403. Such an absolute power over the church property by the members of a religious society would be greatly to be deplored. For if it was once understood that churches were irresponsible bodies, a congregation whose property was large and whose enthusiasm had declined from the loss of a favorite pastor or some other cause, might find it expedient to divide up its property and for the members to join other congregations. Or, being unrestricted in the use of its funds, a congregation might choose to declare a dividend from its surplus income, so that pews would become a profitable investment and the society be reduced to the level of a trading corporation. In this way there would be danger that the number of churches would be diminished, and that many of those that remained might lose their distinctive character. The only safeguard would be the good faith of the congregations, when tempted by a pecuniary gain to which they would have a legal right.

2. Assuming that the deeds and will of Mary Norton created a charity, the act of incorporation, St. 1845, *c.* 229, continued the original trust. *French* v. *Old South Society*, 106 Mass. 479, 487. In general, when a charter is granted to a charity already created by private gift, it is presumed that the charter is granted with the intent of carrying out the original trust. *Attorney Gen-*

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eral v. *Dedham School*, 23 Beav. 350. *Miller* v. *English*, 1 Zab. 317.

The charter of the Old South Society expressly declares that "said corporation shall be deemed and taken to be the successors of said proprietors." The provision that the corporate funds shall be held "for parochial and charitable purposes" shows that the Legislature intended to incorporate a charity. The effect of the charter is, then, to incorporate the proprietors of pews, and one becoming a pewholder under the by-laws of the society thereby becomes a member of the corporation, which holds the legal estate as trustee. The pewholders are also beneficiaries of the charity for the time being. *Second Congregational Society in North Bridgewater* v. *Waring*, 24 Pick. 304. *Attorney General* v. *Federal Street Meeting-house*, 3 Gray, 1, 60, 61. The same persons are therefore at the same time trustees and *cestuis que trust*. But this does not prevent the corporation from being a charity. The same was true in *Thornber* v. *Wilson*, 3 Drew. 245; *S. C.* 4 Drew. 350.

The present pewholders are only a part of the beneficiaries. For the trust is a perpetuity and their successors have an interest in it; and each pew is occupied by many persons besides the owner, his family, friends, lessees or the public, who use it by his license. It is matter of common knowledge that there is rarely more than one owner to each pew, which is nevertheless made to hold five or six persons. So that the original foundation of a church contemplates that the benefits of it shall be enjoyed by a large number of indefinite persons, other than those who have specific legal rights in the property. These two classes of persons have no present representative of their interests, and it is for this reason that the attorney general must be made a party, as in all suits concerning the revenues of charities. The injustice of allowing a few proprietors to settle this question for all the present worshippers and for all future generations is clear. It is the common case of a *cestui que trust* being trustee for himself and others, as in *Belknap* v. *Belknap*, 5 Allen, 468.

But, whatever may be the general principle as to a gift of land to a religious society, it is clear, that under this charter the property, or the excess after paying the expenses of the society, is held for a public charity. If, by the terms of the gift of Mary

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Norton, it was made a public charity, there is nothing in the charter changing that trust. If, on the other hand, the society existing prior to the acceptance of the charter, did not hold the property in trust for a public charity, and could by unanimous consent have disposed of it as they pleased, the transfer of it by unanimous consent to the new corporation, to be used in accordance with the charter for charitable purposes in this Commonwealth, created a public charity. If the surplus above what is necessary for the purposes of the society is held for charitable uses, then the public must be represented in any dealing with the property, otherwise the society could decide how much should be devoted to charitable uses, and the public would have no control.

The expression "and for paying the debts of said corporation" applies only to such debts as are not *ultra vires*, and may lawfully be contracted by the corporation. This does not affect the question of what the nature of the corporation is.

WELLS, J. We find no public charity created by either of the three instruments under which title to the premises in question was derived from Mary Norton.

By her deed of April 1, 1669, the legal estate in the land therein described passed to and became vested in the ten persons named as grantees. A trust was declared, however, the beneficiaries of which were the grantees themselves with "such as they should associate to themselves." The further limitation to "their heirs and successors" indicates that the grantor contemplated a permanence of association of the *cestuis que trust*, and intended to convey the fee in the land.

The purposes of the trust, as set forth in the deed, were, 1st, "for the erecting of a house for their assembling themselves together publiquely to worship God;" 2d, "the erecting of a dwelling-house for such Minister or Ministers as shall be by them and their successors from time to time orderly and regularly admitted for the Pastor or Teacher to the said Church or Assembly;" and they are further guarded by the restriction "and for noe other intent, use or purpose whatsoever."

Gifts for the erection of a house for public worship, or for the use of the ministry, may constitute a public charity, if there is no definite body, for whose use the gift was intended, capable of receiving, holding and using it in the manner intended. To give

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it the character of a public charity there must appear to be some benefit to be conferred upon, or duty to be performed towards, either the public at large or some part thereof, or an indefinite class of persons. *Going* v. *Emery*, 16 Pick. 107, 119. Perry on Trusts, § 710. *Saltonstall* v. *Sanders*, 11 Allen, 446. But when there is a body, or a definite number of persons, ascertained or ascertainable, clearly pointed out by the terms of the gift to receive, control and enjoy its benefits, it is not a public charity, however carefully and exclusively the trust may be restricted to religious uses alone. *Attorney General* v. *Federal Street Meeting-house*, 3 Gray, 1, 49. *Parker* v. *May*, 5 Cush. 336.

The deed of Mary Norton clearly contemplated that the grantees and their associates then formed, or were about to form, a voluntary religious society; and it was for the use and benefit of such society, in the promotion and convenience of the religious exercises and public worship to be maintained and conducted by and for themselves, that her gift was made to aid in providing a house for those religious exercises, and also a house for the residence of such person as should at any time serve them as their minister. *Attorney General* v. *Merrimack Manuf. Co.* 14 Gray, 586, 602.

The *cestuis que trust* were indeed an indefinite number of persons, in the sense that there was no fixed number to whom the designation of "associates" would apply; and they were doubtless intended to include all who should, in accordance with what might be adopted as the rules of association or organization, at any future time become members of the society; and thus the enjoyment would be continued perpetually. A trust so constituted is capable of serving these shifting interests in the beneficiaries; *Second Congregational Society in North Bridgewater* v. *Waring*, 24 Pick. 304; *King* v. *Parker*, 9 Cush. 71, 82; and is not obnoxious to the rule of law against perpetuities which prevent alienation; because the entire interest at any time is represented by known persons living; to wit, the legal estate by the trustees, there being always power in the court, in case of necessity, to supply trustees in whom the estate will vest; the equitable interest by those persons who then constitute the body of the associates or the society, who may be ascertained according to its rules governing membership.

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The character and purposes of the association named as *cestui que trust*, and the designation of the religious uses for which the property was given, do not necessarily indicate an intent to create a public charity. Such an implication sometimes arises from the character of the body to which the gift is made, or from the publicly avowed purposes of its organization and action; as in the case of *Tucker* v. *Seaman's Aid Society*, 7 Met. 188; Concord Female Charitable Society in New Hampshire, *Washburn* v. *Sewall*, 9 Met. 280; American Board of Commissioners for Foreign Missions, *Bartlet* v. *King*, 12 Mass. 536; American Education Society and American Bible Society, *Burbank* v. *Whitney*, 24 Pick. 146; *Bliss* v. *American Bible Society*, 2 Allen, 334.

Property held in trust for a Monthly Meeting of Friends seems to have been regarded as a public charity in *Earle* v. *Wood*, 8 Cush. 430, and in *Dexter* v. *Gardner*, 7 Allen, 243; and for a lodge of Freemasons, in *King* v. *Parker*, 9 Cush. 71. But neither of those cases was a proceeding which concerned the administration of a charity, as such. They were suits in equity relating to trusts, in which the rights of private parties alone were represented. There was no public charity declared in either case, and no adjudication which necessarily involved or was based upon the existence of a charitable trust.

A fund, to be dispensed exclusively by way of mutual benefit or aid among the members of an association, is a private and not a public charity. 3 Gray, 50. 11 Allen, 464. It may well be questioned, therefore, whether all the conditions requisite for a technical public charity were present in the case of *King* v. *Parker*, cited above.

Conceding that "monthly meetings," embracing as they do the entire community of people called "Friends," are so indefinite and general, and the purposes of their organization such that gifts in trust for their use will constitute strictly a public charity, still there is a marked distinction between such bodies and a congregational poll parish or society of defined, regulated, and, therefore, limited membership.

Property devoted to the support and maintenance of public worship, which is public only in the sense that it is open to the public by courtesy, in accordance with the usual practice of all churches in this Commonwealth, does not thereby become a

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public charity. 3 Gray, 50. 14 Gray, 602. *Attorney General* v. *Trinity Church*, 9 Allen, 422. Perry on Trusts, § 732. The deed of Mrs. Norton undoubtedly contemplated public worship of that character, but she entrusted its administration and limited the legal right of enjoyment to those who should become associated with her grantees, and their successors, and thus constitute a poll parish or religious society.

The fact that it is carefully restricted to religious uses, as already suggested, does not alone give it the character of a public charity. *Wells* v. *Heath*, 10 Gray, 17. As a trust, the whole estate passed from the grantor. There is reserved no right of defeasance and reverter or limitation over in case of a disregard of the restriction; and if there were, it would not avail to transfer the use or to convert it from a private to a public charity. *Brattle Square Church* v. *Grant*, 3 Gray, 142. *Wells* v. *Heath*, 10 Gray, 17. *Drury* v. *Natick*, 10 Allen, 169, 183.

The deed of June 30, 1677, does not give rise to any materially different question. It conveys an adjoining estate to the six survivors of the trustees named in the previous deed, and to such as have been "or shall be associated, to them and to their heirs and successors forever, for the ends and purposes in the first above mentioned deed of April the first, 1669, is fully and amply declared," with the house already erected thereon, "for the use of their ministers or ministry orderly chosen by the said society, being the Third Church of Christ in Boston, from time to time and at all times forever." This is not a provision for a ministry at large, or a ministry independent of the society; but is for the benefit of the society by enabling them to provide for the support and convenient residence of such persons as they might employ to serve them as their minister. *Wells* v. *Heath*, 10 Gray, 17, 23.

The will devises her own house to the "Third Church of Christ in Boston," naming, as trustees, two only of the persons who were trustees under her previous deeds. The devise is manifestly intended to be in furtherance of the same objects as the conveyances by deed, and for the use of the same beneficiaries, although differently designated. It is declared to be "for the use of the ministry in the said church successively forever." The reasons for making the gift, assigned by her, especially in connection with the previous deeds, show that it was intended, like the convey-

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ances, for the benefit of the religious society formed by her trustees, their associates and successors, and exclude the idea of a more general public charity.

By the St. of 1845, *c.* 229, the proprietors of pews in the "Old South Meeting-house" and their successors were made a corporation, and authorized to take and hold, to the use of said corporation, in fee simple, the property then "known as the estate belonging to the Old South Church and Society." It is not disputed that these corporators were the proper successors of Mary Norton's grantees and devisees and their associates who constituted the "Church or Assembly" designated by her as the "Third Church of Christ in Boston." They therefore represented the *cestuis que trust*, and were entitled to the beneficial interest in the estate. Precaution not having been taken to preserve a succession in the trustees for the transmission of the legal title, that remained nominally in the heirs of the survivor of the original trustees named by Mary Norton. By the act of incorporation, that title also was made to vest in the corporate body. It was manifestly not the intention of the Legislature that an absolute merger of the two interests should result so as to discharge the estate from the trusts with which it had been impressed. It was accordingly declared that it should continue to be held "for the support of public worship, for parochial and charitable purposes in this Commonwealth, and for paying the debts of said corporation." But this declaration of uses does not define a public charity, even if it were competent for the Legislature to constitute or declare one out of a trust where it did not exist before. Perry on Trusts, § 711.

We cannot doubt that lands so held may be sold by authority of the Legislature; *Stanley* v. *Colt*, 5 Wallace, 119, 169; or of this court as a court of equity, charged with the supervision and enforcement of trusts, under the Gen. Sts. *c.* 100, § 16. We do not find, in the special circumstances and character of the authority conferred by the charter to hold this particular real estate, any inhibition of the usual power of sale by leave of the court, which attaches to trust estates generally. And the special authority to apply to this court, contained in the St. of 1874, *c.* 270, would seem to remove any inhibition which might otherwise be implied from the character of the original act or charter. But

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we think it is equally clear that the vote of a majority of the pewholders or members of the society is not of itself a sufficient authority to enable the corporation to make the sale, nor a sufficient reason to justify this court in authorizing it to be made. The trust is one in which each individual member of the society has an interest as an intended beneficiary, and a right to be heard upon the question of the proper administration of the trust in reference to its original character and purpose, and the effect of the proposed change upon all the members, the minority as well as the majority. It is incumbent upon those who seek to make the change to satisfy the court that it is reasonably required for the accommodation of the society as a whole, and that the proposed change will not subject the minority to an unreasonable sacrifice of interest or convenience, or in any way work injustice to them. The respective rights of the corporation and of its individual members in respect of such property are so fully set forth in the case *In re New South Meeting-house in Boston*, 13 Allen, 497, as to require no further discussion here, in advance of the hearing which must be had to develop the grounds that may exist for or against the proposed sale.

Upon that hearing, the alleged abuse by the corporation, or by the majority, in using the trust funds to build a meeting-house elsewhere, and in resorting to that house for the meetings of the society for public religious worship, will have such weight as it is entitled to have. If, as the minority contend, it deprived the majority of all standing as members of the society and beneficiaries of the trust, so that those who desire to remain and continue the maintenance of public worship in the house upon the original site may be regarded as constituting the body of the society, entitled both to the corporate franchise and the beneficial enjoyment of the trust estate; or if it warrants and requires that the court should remove the trustee and place the estate in the charge of new trustees, to secure the accomplishment of the original purpose of the donor, neither of these results can be reached by either of the present suits: not by the information by the attorney general, because that is based exclusively upon the supposed character of the trust as a public charity, which is not sustained; not by the bill in equity, because no decree in favor of the minority can be made in that, except to refuse to authorize the sale or declare a right to sell.

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The objection that no right was shown to institute the bill in equity in the name and behalf of the corporation was not urged at the argument, and we regard it as waived. That to the non-joinder of the attorney general fails, of course, with the information itself.

The result is that the information by the attorney general must be dismissed, and the bill in equity must stand for hearing before a single justice. *Ordered accordingly.*

HUGH O'BRIEN *vs.* W. T. W. BALL.

Suffolk. March 10, 1874. — Oct. 21, 1875. COLT & ENDICOTT, JJ., absent.

If land is taken under the St. of 1868, c. 277, which authorizes the city of Boston to take lands in a certain district, for the purpose of abating a nuisance, and provides that "the title to all lands so taken shall vest in the city," the liability of a lessee of such land to pay rent to his lessor ceases on such taking, without any eviction by, or attornment to, the city.

Land in Boston was leased for a term of years, and, while the lease remained in force, the land was taken by the city to abate a nuisance, under the St. of 1868, c. 277, which provides that "the title to all lands so taken shall vest in the city;" the lessee continued in possession, and for some time paid rent to his lessor, both parties acting in the belief that the lease continued in force. Afterwards, the lessee being told that he was liable to be held to pay rent to the city, refused to pay rent under the lease. *Held*, in an action by the lessor on the Gen. Sts. c. 137, § 5, to recover possession of the premises, that the judge, who tried the case on the above facts, was warranted in finding that no new tenancy, between the lessor and lessee, was created, and in rendering judgment for the defendant. *Held, also*, that the fact that after the action was begun the city reconveyed the land to the lessor did not affect the case.

ACTION on the Gen. Sts. *c.* 137, § 5, to recover possession of a house on Kirkland Street in Boston, alleged to be held by the defendant unlawfully and against the right of the plaintiff. Writ dated May 23, 1872. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court on appeal, on an agreed statement of facts in substance as follows:

On April 1, 1869, the plaintiff executed to the defendant a written lease of the said premises for a term of five years. The defendant entered into possession under the lease, and has contin-

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ued in possession up to the present time. On March 1, 1872, one month's rent was in arrear and unpaid; the defendant declined to pay the same to the plaintiff, who on March 8 gave him a notice, in due form, to quit in fourteen days, for non-payment of rent.

On July 13, 1870, the city of Boston, in pursuance of the St. of 1868, *c.* 277,* passed an order in due form of law to take possession of said premises, and duly recorded the same in accordance with the act, in the Suffolk Registry of Deeds. Since the commencement of this action, the title to the premises has been reconveyed by the city to the plaintiff.

Some time in the fall of 1871, the city, by its contractors and workmen, entered upon the premises for the purpose of raising the building, as contemplated by the act. The defendant continued to occupy the premises as his dwelling, subject to the disturbance created by such raising, which was considerable; and he continued to pay rent to his lessor during and for some months succeeding the completion of the work done by the city, both parties acting in the belief that the lease continued in full force and effect. The city gave notice to the defendant that it would commence the work of raising prior to so doing, but the defendant paid no attention thereto.

In February, 1872, the defendant was informed, but not by the city or any of its agents, that he was liable to the city for the use and occupation of the premises, and in consequence declined to pay the rent in arrear March 1, as before stated.

A. Russ, for the plaintiff.

R. I. Burbank & R. Lund, for the defendant.

DEVENS, J. The defendant entered upon and occupied the premises, possession of which is sought by this proceeding, by virtue of a lease from the plaintiff which was for the term of five years. During this term the city of Boston, acting by authority of the St. of 1868, *c.* 277, for the purpose of making certain im-

* This statute, entitled "An act for the abatement of a nuisance in the city of Boston, and for the preservation of the public health in said city," authorizes the city to "purchase or otherwise take" certain lands in Boston, and to raise the grade thereof, "so as to abate the present nuisance and to preserve the health of the city," and provides that "the title to all lands so taken shall vest in the city of Boston."

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provements of a public character, took the estate in accordance with the provisions of that statute, and the title thereof was then vested in the city, that of the plaintiff being divested. *Dingley* v. *Boston*, 100 Mass. 544. The plaintiff brings this proceeding for the possession of the premises, upon the ground that the defendant has failed to pay him one month's rent which has accrued since this taking by the city, the defendant still continuing in possession, although disturbed therein by the work which the city has been carrying on, and the plaintiff's right to recover depends upon the question whether any rent was due to him from the defendant. But, even without eviction by, or attornment to, the holder of the new title, the liability to pay the rent reserved ceased with the termination of the plaintiff's estate during the term subsequent to the making of the lease and the entry of the defendant under it. *Lamson* v. *Clarkson*, 113 Mass. 348, and cases cited.

It was for the plaintiff, then, to show that, subsequently to the expiration of his title, a new tenancy had been created; and upon the facts stated, the court below was warranted in finding that no agreement for such new tenancy was shown, and in rendering judgment for the defendant.

Since this proceeding was commenced, the city of Boston has reconveyed to the plaintiff the title to these premises; but this cannot affect the case, which is to be determined by the condition of things which then existed. *Judgment affirmed.*

LOUIS HAMILBURGH *vs.* LORENZO H. D. SHEPARD.

Suffolk. March 4. — Oct. 21, 1875. MORTON & ENDICOTT, JJ., absent,

The declaration in an action for malicious prosecution contained a count for the abuse of the process of the court in suing out the writ, and a count for an assault and battery in causing the officer to make an arrest of the present plaintiff under said writ. At the trial it appeared that the writ upon which the plaintiff was arrested was in due form and issued from a court of competent jurisdiction, and that the arrest was made by the officer within the scope of his authority; that after the present action was brought, and before the entry of that action, it was agreed to enter "neither party," in that action, and the writ was never returned into

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court. *Held*, that the cause of action, however stated in the declaration, was in substance and legal effect for malicious prosecution; and that the action was prematurely begun.

TORT. Writ dated June 11, 1873. The first count of the declaration alleged that the defendant maliciously and without probable cause procured the arrest of the plaintiff, on a writ in a civil action, and caused to be extorted from him the sum of $162.

The second count alleged the suing out of a writ by the defendant, "for a private and unlawful purpose of his own, to wit, for the purpose of obtaining from the plaintiff a certain large sum of money," under the color of a legal claim; the arrest of the plaintiff under said writ, and his imprisonment for the space of three hours, "whereby the defendant did make an unlawful use and an abuse of the legal process" of said court, "and by said abuse of legal process did subject the plaintiff to great loss and damage in his business and reputation, and oblige him to deliver to the defendant a large sum of money, to wit, the sum of $162."

The third count was as follows: "And the plaintiff further says that the defendant by himself, his agents and servants, and with force and arms at Boston aforesaid, assaulted the plaintiff and caused him to be illegally arrested, imprisoned and detained for a long time, to wit, for three hours, until to gain his liberty he was compelled by the defendant, his agents and servants aforesaid, to deliver to him, the defendant, his agents and servants aforesaid, a large sum of money, to wit, $162; and the plaintiff says that the defendant had no cause of complaint against him, criminal or civil, whereupon he could lawfully predicate any such arrest, imprisonment and detention and extortion of money; and the plaintiff further says that by such arrest, imprisonment and detention, and by the extortion aforesaid, his business was greatly impeded, he was subjected to great inconvenience and expense, his reputation was much injured, and he suffered great vexation, grief and oppression. All which is to the special damage of the said plaintiff as he says the sum of three thousand dollars."

At the trial in the Superior Court, before *Bacon*, J., the evidence was that the plaintiff hired of the defendant a store, the rent of which was payable monthly; that the plaintiff having sold out his stock, and being about to go to Europe, the defend-

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ant, on June 9, 1873, by advice of counsel, caused the plaintiff to be arrested on a writ of the same date, although the rent was not due till June 14, 1873; that the officer arrested the plaintiff and detained him for about two hours, and then released him upon his furnishing a sum of money, which the officer took and held, as he claimed in his return, by attachment.

There was no claim made that the officer in any way abused his authority under said writ, or was guilty of any misconduct in the service thereof, but only that the defendant knew he had no cause of action, and sued out said writ with such knowledge, and directed the service made thereon. So far as the form of the writ was concerned, the officer was justified in the arrest.

The plaintiff paid the defendant his rent when due, June 14, 1873, and on June 16, 1873, the officer returned to the plaintiff the money of the latter, and it was then agreed between the plaintiff and the defendant that the suit on which the plaintiff had been arrested should be entered "neither party." The writ in that suit was returnable June 28, 1873, and was never entered in court.

The presiding judge ruled that the action could be maintained, if at all, only for a malicious prosecution, and that the evidence showed that it was prematurely begun, and instructed the jury to find for the defendant. The plaintiff alleged exceptions.

M. Fischacher, for the plaintiff. 1. The first count is for a malicious prosecution. The second for an abuse of legal process to extort money. The third for an assault and battery. The testimony was introduced without the plaintiff being required to elect as to either count, and proved an assault and battery at least. The defendant was liable for such assault and battery, unless he could justify. The action was not premature as to the third count at least. See *Leland* v. *Marsh*, 16 Mass. 389.

2. There being evidence tending to establish the allegations of either count, the court erred in ordering a verdict for the defendant. The case should have been submitted to the jury upon all the evidence, with proper instructions as to its application to the different counts.

3. The second and third counts containing allegations of causes of action, and there being evidence establishing or tending to

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establish the same, the court erred in limiting the plaintiff to the first count and instructing the jury to find for the defendant on that account. In this case the court did not recognize the fact that one series of acts gives rise to different causes of action; and the rule that would apply to malicious prosecutions alone does not apply to other causes of action arising therefrom. *Emery* v. *Hapgood*, 7 Gray, 55.

J. D. Long, for the defendant.

GRAY, C. J. The writ upon which the plaintiff was arrested being in due form and issued from a court of competent jurisdiction, and the arrest having been made by the officer within the scope of the authority thereby conferred upon him, the plaintiff's cause of action, however stated in his declaration, is in substance and legal effect for malicious prosecution, and cannot be sustained without proof that the prosecution had been determined, which it had not been when this action was commenced. *Cardival* v. *Smith*, 109 Mass. 158. *O'Brien* v. *Barry*, 106 Mass. 300.

Exceptions overruled.

WILLIAM C. FOWLER *vs.* MCLAREN F. PICKERING.

Suffolk. March 12. — October 22, 1875. AMES & ENDICOTT, JJ., absent.

The owner of a vessel chartered it, retaining the necessary room for the crew, to A. to bring a cargo to the port of B. or the port of G., the port to be named before clearing. A. named B. as the port and the vessel sailed on said voyage. Subsequently an agreement was made between the owner and A. by which A. was to pay all extra charges incurred if he should elect to have the destination of the vessel changed from B. to G. Before the vessel arrived at G., a letter was sent by A. without the knowledge of the owner of the vessel, to the office of the pilots in B., directed to the master of the vessel, requesting him to go to G. This letter was delivered at sea to the master by a pilot, and an agreement was made by which the pilot was to receive for taking the vessel to G. as much as he would have been entitled to as pilotage, if he had taken the vessel to B. This was paid. The pilot then brought an action against the owner of the vessel to recover compensation for taking the letter to the master, and at the trial put in evidence of a local usage in the port of B. for pilots to charge and receive a pilotage fee for delivering such a letter to the master of a vessel. The judge instructed the jury that in order to charge the defendant they must find that either the owner or master had knowledge of the usage, and that if they should find that either had such knowledge and

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should find the usage to be proven they must find for the plaintiff. *Held*, on exceptions taken by the defendant, that the contract relied on, if proved, was within the scope of the master's authority and would bind the owner; and that the contract between the owner and the charterer in respect to paying for extra charges, in case of a change of port, did not affect the defendant's liability to the plaintiff. *Held, also*, that knowledge of the usage, on the part of the master, must be shown, and that it was not enough to show that the defendant had knowledge of the usage. *Held, also*, on the issue whether an implied contract was to be inferred from the act of the master in going to G., that the contract made between him and the pilot, about taking the vessel in, might have a material bearing.

CONTRACT to recover $90 for services rendered by a branch pilot of Boston, in delivering to the master of the ship Anna Decatur the following letter directed to the captain, dated New York, May 29, 1873, and signed "Woodruff & Robinson:" "Dear Sir,—You will please proceed to Gloucester with your vessel and there report to Messrs. John Pew & Son, who will receive your cargo salt."

At the trial in the Superior Court, before *Pitman*, J., the plaintiff proved that the defendant was at the times here mentioned a part owner of the ship Anna Decatur; and that the plaintiff was and still is a branch pilot for the port and harbor of Boston, and received the above letter late in May or early in June, 1873; that he carried the letter in his pilot boat and delivered it to the master of the ship off the Highlands of Cape Cod, and thereupon under a special oral agreement, hereafter named, piloted the ship into the harbor of Gloucester, and claimed to recover a fee of $90 for delivering said letter. The plaintiff called several branch pilots of the harbor and port of Boston, who had been such for many years; all of whom testified that there is and long has been a custom and usage among the branch pilots of the harbor and port of Boston, to charge and receive a pilotage fee for delivering a letter such as the above to the master of a vessel bound to Boston, which pilotage fee is equal in amount to the regular fee provided by law for piloting such vessel into the harbor of Boston. These witnesses testified that they never inquired from whom the letter came, and that they always looked to the master or owners of the vessel for this fee whenever the port was changed in consequence of the letter. There was no other evidence offered upon this point except that two of the witnesses testified that they understood or had heard that a corresponding custom exists among the

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pilots of the port of New York; and except that each witness admitted that he knew of no case where this fee had been charged to and paid by the master or owner of the ship, where the letter came from the consignee or owner of the cargo or charterer, they, the pilots, not caring whom the letter was written by, provided that the captain recognized and acted upon it. It was admitted that the plaintiff and the master of the ship made an agreement, when the plaintiff boarded the ship and delivered the letter, that if the plaintiff would undertake to try to pilot the ship into Gloucester he should receive therefor the regular fee for piloting the ship into Boston; and it was admitted that the master gave to the plaintiff the order following, dated Gloucester, June 2, 1873, directed to the defendant:

"Please pay to bearer the customary Boston pilotage for bringing the Anna Decatur from sea to this port. The boat No. 6 gave orders off Cape Cod;" and that, upon that order, this latter fee had been paid the plaintiff by the defendant.

One Hayden, a witness for the defendant, testified, on cross-examination, that the words, "The boat No. 6 gave orders off Cape Cod," was the usual and customary authority from a master to an owner to pay letter pilotage, for the last fifteen years, which was uncontradicted.

The plaintiff did not rely upon any agreement upon which to recover this additional fee of $90 now sued for, but relied solely upon the said custom or usage.

It was further proved that the ship was chartered, with the exception of the cabin and necessary room for the crew, and storage of provisions, sails and cables, by Messrs. Woodruff & Robinson, of New York, to proceed to Cadiz, Spain, and there to load a cargo of salt, and to proceed therefrom "to Gloucester or Boston, Mass., U. S. A., port to be named before clearing;" and that said ship at the times here mentioned was proceeding from Cadiz, with the said cargo on board, bound to Boston, which port had been named by the charterers before clearing; that the charterers, after the vessel had departed from Cadiz, sent the foregoing letter to their agent in Boston, one Byrnes, who forwarded it to the pilots' office, where it was received by the plaintiff; that this was done without the knowledge or consent of the owners of the ship, the defendant being absent from the country; and that the

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plaintiff, when he received and delivered the letter, did not know and did not inquire from whom the letter came.

The master of the ship testified that he resided at Saco, Maine, that he had been master of a ship for a little over ten years; that during that time he had been once, before this passage, into the port of Boston, and that previously to his taking command he had been several times into the port of Boston; that he did not know of any usage or custom such as the plaintiff relied on, or any other usage or custom relating to charging for putting a letter on board a vessel; and that by receiving the letter he changed his port of destination from Boston to Gloucester. A letter written by the defendant was introduced, in which he stated that he recognized a custom in the port of Boston for the pilot putting a letter on board a vessel to charge and receive a fee therefor from the master or owner of the ship, but that he was not aware, and did not understand, that there was any custom or usage to charge such fee to the shipowner or master when the letter was sent by the owner of or representative of the cargo, and not by the owner or agent of the ship.

The defendant also testified that he made an agreement with the charterers that they should pay all extra charges incurred, provided they should elect to have the ship change her port of destination from Boston to Gloucester. There was no other evidence bearing upon the question of knowledge of the defendant or other owner or master of a custom or usage. The defendant testified, without contradiction, that it was of no service or benefit to the ship or her owners for her destination to be changed; and that it would have been of pecuniary benefit to them if she had been allowed to proceed to Boston, whither she was bound. There was no other material evidence in the case bearing upon these questions.

The defendant asked the judge to rule that the plaintiff could not maintain this action: "1st. Because upon the evidence the jury would not be warranted in finding a custom or usage under which the defendant could be charged, as the letter was sent by the owner of, or agent for, the cargo, and without the knowledge and consent of the master, owner or owners of the ship. 2d. That if such a finding would be warranted upon the evidence, such a usage or custom would be unreasonable, and that such a

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usage or custom would be void in law. 3d. That the usage relied upon is a local usage, and that there was no evidence that it was or is brought home to the knowledge of the defendant or the master or other agent or owner of the ship." But the judge declined so to rule, and instructed the jury that the usage claimed is a local usage, and that in order to charge the defendant they must be satisfied that either the defendant or the master had knowledge thereof; and that if they should find that either of them had such knowledge, then it was for the jury to say whether a usage to charge the shipowner in case the letter is sent by the charterer or other agent for or owner of the cargo, was proven; and that if they found such a usage to be proven, they must find for the plaintiff. The jury found for the plaintiff for $90; and the defendant alleged exceptions to the rulings and refusals to rule as requested.

F. Goodwin, for the defendant.

No counsel appeared for the plaintiff.

WELLS, J. The defendant is liable in this action, if at all, by reason of some contract, express or implied, between the plaintiff and the master of the vessel acting within his authority, as master, to bind the owners. The contract relied on in this case, if otherwise established, was within the scope of the master's authority, and would be binding upon the owners. *Grant* v. *Norway*, 10 C. B. 665. *Bliss* v. *Ropes*, 9 Allen, 339. Story on Agency, § 116. The agreement between the defendant and the charterers, that the latter "should pay all extra charges incurred, provided they should elect to have the ship change her port of destination from Boston to Gloucester," would not affect the question of the defendant's liability in the first instance to the parties dealing with the master in matters affecting the navigation of the ship.

Upon the question whether there was an implied promise to remunerate the plaintiff for the service rendered by him in delivering to the master a communication relative to the voyage, by reason of which he was led to change his port of destination, the alleged custom or usage of the port was competent as evidence; not because the usage alone would impose or prove a liability, but as affording ground for the inference that by receiving and availing himself of the communication, and acting in accordance

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with its directions or request, the master accepted the service as rendered to the vessel. The alleged usage being a local one, it was rightly ruled that knowledge of its existence must be shown. But, in determining whether a promise is to be implied from the conduct of the master, it is his knowledge of the local usage relied on that is important, and not the knowledge of his principal who took no part in the transaction. The ruling at the trial was erroneous in allowing knowledge of the local usage by the owner on shore to affect the inferences to be drawn from the conduct of the master at sea. The ruling was also erroneous in directing the jury "that if they found such a usage to be proven they must find for the plaintiff." It was still a question of fact whether, in view of such a usage, known to the master, a promise to pay for delivering the letter, as a distinct service, is to be inferred from the conduct of the parties. And upon this question the express agreement made between the master and the plaintiff when the latter boarded the ship and delivered the letter, "that if the plaintiff would undertake to try to pilot the ship into Gloucester he should receive therefor the regular fee for piloting the ship into Boston" might have a material bearing.

Exceptions sustained.

JOSHUA M. WHITCOMB *vs.* JAMES C. CONVERSE & others.

Suffolk. March 15. — Oct. 22, 1875. AMES & ENDICOTT, JJ., absent.

Articles of copartnership between C., W., B. and S., for the transaction of a commission business, provided that C. and W. should contribute the whole capital in unequal proportions; that C. should contribute "such time as he may be able to give;" that W., B. and S. should each contribute all their time to the business; that each partner should receive one fourth of the net profits; and that C. and W. should receive interest on the capital contributed by them. The partnership was afterwards dissolved by mutual consent, the business of the firm closed by W., and it resulted in a loss. *Held*, on a bill in equity by W. against the other partners, that the capital constituted a debt of the partnership to which all the partners were bound to contribute equally, and that, one of them being insolvent, the loss was to be borne equally by the other three.

BILL IN EQUITY, filed July 3, 1873, by a partner in the late firm of Converse, Whitcomb & Co. against the other partners,

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James C. Converse, Walter Stanton and Edwin R. Blagden, to compel contribution to the losses incurred by the partnership. The articles of partnership were as follows:

"Terms of agreement of copartnership for the transaction of a dry-goods commission business in New York and Boston between the undersigned, to commence the second of January, 1871, and continue one year, under the firm name of Converse, Whitcomb & Co.

"J. C. Converse to contribute twenty-five thousand dollars; to receive interest on the same at 7 per cent., and devote such time as he may be able to give; to receive 25 per cent. of net profits.

"J. M. Whitcomb to contribute fifty thousand dollars, receive 7 per cent. interest on the same; to give all his time to the business, and receive 25 per cent. of the net profits.

"E. R. Blagden to contribute all his time to the business, and receive 25 per cent. of the net profits.

"Walter Stanton to contribute all his time to the business, and receive 25 per cent. of the net profits.

"J. C. Converse and E. R. Blagden to attend to the business in Boston. J. M. Whitcomb and Walter Stanton to attend to the business in New York. Each partner shall be allowed to draw only $500 per month for personal expenses."

Hearing before *Colt*, J., who reported the case for the consideration of the full court in substance as follows:

The plaintiff contributed $25,000 of the amount mentioned in the agreement to be contributed by him.

The partnership was dissolved by mutual consent on March 9, 1871, and the plaintiff was authorized in the agreement of dissolution to settle up the affairs of the firm. He did so, and there resulted therefrom a loss, as he contended, of $25,000, more or less, being less than the amount of the capital to be put in by the plaintiff; but whether the loss in question was a partnership or individual loss, is one of the questions reserved as hereinafter stated. The defendant Blagden, at the time of the dissolution, was, ever since has been, and now is, insolvent and unable to pay any part of said loss. Whitcomb, Converse and Stanton have each paid back to the firm all sums drawn out by them, respectively, for personal expenses, under provision therefor in the memorandum, and Stanton, when he entered the firm, had the

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control of the business of certain woollen mills, and brought this into the firm; and he testified, without contradiction, that he brought the bulk of the business to the firm.

The defendant Stanton contended, that he was not liable to make good any portion of the capital contributed to the business by the plaintiff, and expended in paying partnership debts, and that, if liable, he was not liable to make good the share which Blagden would have contributed, but for his insolvency, or any part of said share.

The cause was reserved upon the foregoing facts and evidence. If the court shall be of opinion that the plaintiff is entitled to any contribution to said loss from either of the defendants, the cause is to be referred to a master to ascertain the amount thereof. If he is not entitled to recover from either of the defendants, the bill is to be dismissed as to such defendant.

C. T. Russell, for the plaintiff.

G. O. Shattuck & O. W. Holmes, Jr., for the defendant Stanton. 1. The plaintiff cannot recover of his former partners, for a loss of the capital stock contributed by him. In *Barfield* v. *Loughborough*, L. R. 8 Ch. 1, where attorneys had contributed to the firm capital in certain proportions, the question was whether interest should be allowed on their respective shares in the capital, after dissolution. The Lord Chancellor, while admitting that advances beyond the stipulated amount of capital might be treated as debts, laid it down distinctly as fundamental doctrine that "Neither partner has a personal demand upon the other for the repayment of his share of the capital employed in the business." He said that "in most of such cases there is either an express written agreement, or practice and usage equivalent thereto, that during the continuance of the partnership, interest shall, before each division of profits, be credited to both parties on the amount of capital standing to the credit of their respective accounts." This is so because the capital has been employed for the profit of the firm. But there is no such claim after dissolution, notwithstanding the shares of the partners in the capital were unequal, for the very reason that it is capital, and not a debt of the concern. Interest was allowed in the particular case only on the footing of a written agreement expressly making the capital a firm debt, equally with further advances. See also *Everly* v

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Durborow, 1 Leg. Gaz. Rep. 127, *per* Sharswood, J.; *Cameron* v. *Watson*, 10 Rich. Eq. 64, 101, 102, 103; *Heran* v. *Hall*, 1 B. Mon. 159; Lindl. Part. (2d ed.) 790, 791; Story Part. § 26, note, citing and approving Rutherforth Inst. Bk. 1, *c.* 13, §§ 32, 35; Watson Part. 57; Parsons Part. 51.

On principle it is submitted that the defendant cannot be liable. If A. and B. agree to labor together a year for their joint advantage, and to share profits, and they make no profits, each loses his labor. If A. and B. are partners in shoemaking for a year, A. to furnish leather or money to purchase leather, and B. to make it into shoes, A. and B. to divide the profits, and they make no profits, B. loses his labor as before. But B. cannot be held to insure A.'s contribution on any principle which would not equally make A. insure B. Even the seeming difference in the nature of the respective contributions is not a true one. Before the goods are sold and the question of profit or loss settled, B.'s labor has been converted into capital, in the strictest sense of the word, by the change in form and increased value which it has given to the leather. The same is true when the labor of B. consists in selling instead of changing the form of goods. He increases their value for A.'s purposes by helping them to a market, and his labor is an element in the price which they fetch. The principle is not affected by an agreement to allow interest on the capital put in while it is being used for the joint advantage, which is said to be the usual thing in *Barfield* v. *Loughborough*, *ubi supra*.

A wholly different case is presented when a partner advances money to his firm, which he is not required by the articles to contribute to the partnership stock, for such an advance is not a contribution to the firm capital. So, perhaps, when one partner advances all the money for a single venture, and the other is to take half the profits and contributes neither labor nor funds, it may be inferred that sharing the risk is the consideration of being permitted to share the gain. These considerations explain the decision in *Nowell* v. *Nowell*, L. R. 7 Eq. 538, the language of which induced Mr. Lindley to change his text, contrary to his own previously expressed opinion.

The only question in any case is, whether the money is a contribution to firm capital or not. The money put in by the plain

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tiff in this case was put in under an agreement requiring him to "contribute" it, just as it required Stanton to "contribute" his time, and as he, in fact, also contributed the firm business. The two stand on the same footing as to the risk of their respective contributions. "Contribute" is the apt word always used to signify bringing in to the capital stock. See *Morris* v. *Allen*, 1 McCarter, 44, 45; *Everly* v. *Durborow*, *ubi supra*; *Cameron* v. *Watson*, *ubi supra*.

This agreement of course was made in the confident expectation of gain. Losses were not expected. The risk was considered as practically nothing and not to be taken into account, or they would not have gone into the venture. The parties show this by their contract, and set their own valuation on their respective contributions. The contract shows that Stanton's skill (together with the business which he brought in) was considered as valuable as what the plaintiff contributed, above the ordinary value of the safe use of money, which was separately paid for. It is to be presumed from the contract that if the plaintiff had not put in money he would not have got a quarter of the profits, and that he was willing to employ his money in this way because he was confident of making gains by the aid of the talents, energy and business contributed by younger men. Such partnerships as this are formed every day between capitalists and young men who have ability, but want money; and it is manifest that this is not done in reliance upon getting indemnity for losses from the penniless, but upon so strong an expectation that they will turn the money to better account than the owner could without them, as to induce the owners to disregard the possibility of loss, and run the risk. Each party puts what he has against what he wants; the poor man not supposing that he is assuming the burden of a debt, and the rich man not warranting a return for the poor man's labor.

2. If the defendant is liable, he is not to make good any part of what another partner cannot pay. Parsons Part. 477. *Ex parte Watson*, Buck, 449.

GRAY, C. J. In the absence of controlling agreement, partners must bear the losses in the same proportion as the profits of the partnership, even if one contributes the whole capital, and the other nothing but his labor or services. 3 Kent Com. 28, 29.

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Whether a loss of capital is a partnership loss, to be borne by all the partners, depends upon the nature and extent of the contract of partnership.

If, as is not unfrequently the case in a partnership for a single adventure, the mere use of the capital is contributed by one partner, and the partnership is in the profits and losses only, the capital remains the property of the individual partner to whom it originally belonged, any loss or destruction of it falls upon him as the owner, and, as it never becomes the property of the partnership, the partnership owes him nothing in consideration thereof. Story Part. §§ 27, 29. *Heran* v. *Hall*, 1 B. Mon. 159.

But where, as is usual in an ordinary mercantile partnership, a partnership is created not merely in profits and losses, but in the property itself, the property is transferred from the original owners to the partnership, and becomes the joint property of the latter; a corresponding obligation arises on the part of the partnership to pay the value thereof to the individuals who originally contributed it; such payment cannot indeed be demanded during the continuance of the partnership, nor are the contributors, in the absence of agreement or usage, entitled to interest; but if the assets of the partnership, upon a final settlement, are insufficient to satisfy this obligation, all the partners must bear it in the same proportion as other debts of the partnership. *Julio* v. *Ingalls*, 1 Allen, 41. *Bradbury* v. *Smith*, 21 Maine, 117. *Barfield* v. *Loughborough*, L. R. 8 Ch. 1. *In re Anglesea Colliery Co.* L. R. 2 Eq. 379, 387; *S. C.* L. R. 1 Ch. 555. *Nowell* v. *Nowell*, L. R. 7 Eq. 538. *In re Hodges' Distillery Co.* L. R. 6 Ch. 51, 56. 1 Lindl. Part. (3d ed.) 696, 827, 828.

Only two cases were cited in the learned argument for the defendant Stanton, in which opinions inconsistent with this view have been expressed.

The one is *Everly* v. *Durborow*, 1 Leg. Gaz. Rep. 127, a *nisi prius* decision, with no reference to authorities, except an early edition of Lindley on Partnership, which has been corrected by the learned author, *ubi supra*, conformably to the adjudged cases.

The other is *Cameron* v. *Watson*, 10 Rich. Eq. 64. That was a bill in equity to settle the affairs of a partnership, to which Cameron had contributed labor and Watson capital. The mas-

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ter, to whom the case was referred, allowed the claim of Watson for so much of the capital as he had not withdrawn during the continuance of the partnership, but disallowed his claim for interest thereon. pp. 68, 73. Cameron excepted to the allowance of Watson's claim for capital, and Watson excepted to the disallowance of interest. The chancellor, before whom the exceptions were heard in the first instance, overruled the exception of Cameron, and also that of Watson as regarded interest before the dissolution of the partnership, but sustained it so far as to allow him interest after the dissolution. pp. 88–90, 95, 96. The Court of Appeals, although in one part of its opinion appearing to discountenance Watson's claim for capital, ended by confirming the master's report in every particular. pp. 103, 107, 108. So that the final judgment, while it disallowed Watson's claim for interest, established his claim for capital, and was in exact accordance with our conclusion.

In the case at bar, the partnership was not for a single enterprise, but for the transaction of a commission business in New York and Boston for a year. Converse and Whitcomb contributed the whole capital, in unequal proportions. Converse was to contribute "such time as he may be able to give;" and Whitcomb and the other two partners, Blagden and Stanton, were each "to contribute all his time to the business." Those partners who contributed the capital did not contribute merely the use thereof, but the capital itself, and were by express agreement to receive interest thereon at rates specified in the articles of copartnership. The partners were by agreement to receive each one fourth of the net profits, and by implication of law must share the losses in the same proportion. The capital contributed became the property of the partnership; and the partnership, consisting of all the partners, became liable to Whitcomb and Converse respectively for the amount of capital paid in by them.

Blagden, one of the partners, being insolvent and unable to discharge any part of the obligation, it must rest in equity upon the three solvent partners in equal proportions. *Whitman* v. *Porter*, 107 Mass. 522. 1 Lindl. Part. 789, 790.

Decree for the plaintiff accordingly.

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COMMONWEALTH, by Insurance Commissioner, *vs.* MASSACHUSETTS MUTUAL FIRE INSURANCE COMPANY. George W. Taylor, petitioner.

SAME *vs.* SAME. William Minot & others, Receivers, petitioners.

Suffolk. June 23. — Oct. 27, 1875. — COLT & AMES, JJ., absent.

A policy, issued by a mutual fire insurance company, insured the holder against loss or damage by fire under the conditions and limitations expressed in the rules of the company, and stated the undertaking of the company to be "to satisfy and make good, from the absolute and conditional funds of the company, unto the said assured, all the damage by fire which may happen to said real estate, within the term aforesaid, according to the true intent and meaning of said rules. Provided, nevertheless, that if the whole of the absolute and conditional funds of said company shall be insufficient to pay and satisfy all damages that may happen, in such case a just average shall be made to the sufferers, and the payment to be demanded in virtue of this policy shall be a dividend of said stock, in proportion to the sum insured and the rate of damage." One rule required notice of a loss to be given in a prescribed manner, and provided that "payment shall be made in thirty days after receiving notice of the loss as above." Another rule provided that "in case losses should happen so as to absorb the whole of the absolute fund, the president and directors shall, within twenty days, proceed to assess on each member a sum not exceeding double the amount by him paid by way of premium and deposit, and the same assessment publish in two or more newspapers in Boston. They shall then collect the said assessment without delay; and in thirty days after such notice shall have been given, they shall actually proceed in due form of law against each delinquent, and thereby be completely exonerated. In case of neglect, they may be subjected to the penalty expressed in the act of incorporation. In case of neglect to pay said assessment, such delinquent's policy or policies shall cease and determine until payment is made, with interest, and such reasons given for the delay as shall be satisfactory to the president and directors." *Held*, that after losses which absorbed the absolute funds of the company and required an assessment upon the contingent liability of the members, the insured who had sustained losses were not entitled to interest thereon out of the surplus remaining from the assessments after the payment of the losses.

A mutual fire insurance company is not liable for any loss which occurs after the appointment of receivers and the judicial sequestration of all its property; and where, upon the happening of losses which absorb the absolute fund of the company and require an assessment upon the contingent liability of the members, the fund accruing from the assessment is more than enough to pay for the losses, the receivers are not entitled to retain any part of the surplus for the purpose of meeting future losses.

Where the losses upon policies issued by a mutual fire insurance company are so large as to exhaust the absolute fund of the company, and an assessment is made in accordance with the rules of the company, upon the contingent liability of the members, which proves to be more than sufficient to pay the amount required, the surplus is, in the absence of any requirement in the rules of the company that it shall be devoted to other uses, to be repaid to the members by whom the assessment was paid.

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THE FIRST PETITION was by George W. Taylor, filed September 29, 1873, alleging that on July 1, 1866, the defendant company insured him against loss by fire on his house and ware-room, in Boston, for the term of seven years; that on June 18, 1873, the said buildings were partially destroyed by fire; that the amount of the loss was $997, and that proof thereof was duly made.

The prayer of the petition was that William Minot, Charles B. Cumings and Lemuel Shaw, who had been appointed receivers of the defendant company, be ordered to appear and show cause why the dividends on the amount due the petitioner under said policy of insurance, on account of said loss, should not be paid to him. Annexed to the petition was a copy of the policy, on which were printed the rules of the defendant company. So far as these are material, they appear in the opinion.

The answer of the receivers admitted the facts stated in the petition; and alleged that on November 27, 1872, on application of the insurance commissioner to this court, the company was restrained by injunction from further proceeding with its business; that on December 7, 1872, it appearing to the court that the company was insolvent, said receivers were appointed, with authority to take possession of the property and effects of the corporation, and to collect the debts, to pay all debts due from said corporation, if the funds in their hands should be sufficient, and, if not, to distribute the said funds ratably among the creditors, and to distribute the residue, after payment of said debts, to and among the persons legally entitled thereto; and the injunction previously issued was made perpetual; that on the sixth day of December, 1872, the directors made an assessment for the payment of losses accruing prior to said date, by vote, as follows: "Whereas, members of this corporation did, during the month of November last, and on and after the ninth day thereof, sustain damage by fire over and above the existing funds of the corporation by an amount exceeding the whole liabilities of the members subject to assessment, it is therefore voted: First, that an assessment of an amount equal to two dollars for each and every dollar advanced as premium and deposit be made upon each person and company that was a member of this corporation at twelve o'clock at noon on the ninth day of November last, and that is liable for

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losses occurring during said November and after said twelve o'clock at noon. Second, that the president give notice of the above vote to each member of the corporation, and also publish notice of this assessment in two or more newspapers in Boston. Third, that the president be authorized to collect said assessments without delay, and to cancel outstanding policies on the payment of said assessments."

The answer further alleged that on April 7, 1873, the assessment above mentioned was duly ratified, confirmed and established by this court; that nearly all said policies have been formally cancelled on payment of the assessments due thereon, that notices of the assessment due on his policy were sent to and received by the petitioner on December 6, 1872, and on April 16 and July 1, 1873, and said assessment has not been paid, and that his policy has not been cancelled, unless by the acts, omissions and proceedings hereinbefore set forth; that said receivers have been ordered to pay dividends to the amount of one hundred per cent. on all claims heretofore proved and allowed against said company, and that nearly all said dividends have been paid, but no interest has been hitherto allowed or paid on said claims; that the assets in the hands of the receivers will probably be sufficient to pay said claim of said Taylor, after making all payments heretofore ordered by this court, and after paying the expenses of winding up the affairs of the company; but that there are certain other policies, the terms of which have not expired, on which assessments have not been paid, and which are not known to have been forfeited or cancelled unless by the neglect to pay said assessment and by the proceedings hereinbefore set forth.

At the hearing before *Endicott*, J., the facts alleged in the petition and answer were admitted, and the question was reserved for the full court whether on these facts the petitioner was entitled to any, and, if any, what payment on account of the claim set forth in his petition.

THE SECOND PETITION was by the receivers of the defendant company filed May 12, 1875, alleging that an assessment was levied by the directors of the company upon the members thereof, and approved by this court, to pay claims for fire losses occurring prior to December 6, 1872; that, in levying the assessment, an allowance of fifteen per cent. was made for probable bad

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debts and expenses of collection; that the receivers have collected upwards of ninety-eight per cent. of the assessment, and believe that still further collections can be made; that they have paid from time to time, in accordance with the decrees of this court, one hundred per cent. on all said claims for fire losses, but have paid no interest on said claims; that there will remain in their hands after the aforesaid payments, and after paying expenses and charges of collection, upwards of eighty thousand dollars, that, by the rules of the company, all claims for fire losses were payable thirty days after notice thereof; that notice of the claims above mentioned was given (or notice thereof waived by the company,) before December 6, 1872; that in accordance with the vote of the directors of the company on levying the assessment, and under the authority of this court, the president of the company has cancelled policies outstanding at the date of the assessment, on payment thereof; that by the by-laws of the company it is provided that policies shall cease and determine in case of neglect to pay any assessment on the same; that there are about fifty policies which have not been formally cancelled, and which were issued for a term of years which has not yet elapsed, but on which the assessment remains unpaid.

The prayer of the petition was for the direction of the court on the following points:

1. Whether interest shall be paid on claims for the fire losses first above mentioned.

2. Whether any of said uncancelled policies above mentioned are to be treated as subsisting policies, and whether any moneys shall be reserved for the payment of losses which may hereafter occur thereon.

3. Whether any surplus remaining after making such payments and reservations as the court may decree, shall be repaid to persons who shall have paid in full the sums assessed upon them, in proportion to the amount of the assessment so paid, or shall be paid to holders of policies which were in force at the date of said assessment on account of claims for the value of the unexpired terms of said policies, or for unearned premiums and deposit money.

The case was heard and reserved by *Gray*, C. J., for the consideration of the full court upon the three questions stated in the prayer of the petition.

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J. Q. A. Brackett, for Taylor.

J. C. Davis, for a creditor contending that interest should be paid on his claim.

G. O. Shattuck, for the receivers.

MORTON, J. 1. The directors, by their vote of December 6, 1872, made an assessment of an amount equal to two dollars for each and every dollar advanced as premium and deposit. This was the whole amount to which the members of the corporation were liable to be assessed under the charter and by-laws. So much of this amount has been collected by the receivers, that they have paid in full the principal of all the losses by fire which occurred prior to the date of the vote, and there remains in their hands a large surplus. The first question presented by their petition is whether they shall pay interest upon such losses.

The solution of this question depends upon the construction of the peculiar contract into which each member of the corporation enters with the other members.

The holder of a policy is "insured against loss or damage by fire under the conditions and limitations expressed in the rules" of the company. In each policy, the undertaking of the company is "to satisfy and make good, from the absolute and conditional funds of the company, unto the said assured, all the damage by fire which may happen to said real estate, within the term aforesaid, according to the true intent and meaning of said rules. Provided nevertheless, that if the whole of the absolute and conditional funds of said company shall be insufficient to pay and satisfy all damages that may happen, in such case a just average shall be made to the sufferers, and the payment to be demanded in virtue of this policy shall be a dividend of said stock, in proportion to the sum insured and the rate of damage."

The twenty-first rule requires notice of a loss to be given in a prescribed manner, and provides that "payment shall be made in thirty days after receiving notice of the loss as above."

The twenty-sixth rule provides that "in case losses should happen so as to absorb the whole of the absolute fund, the president and directors shall, within twenty days, proceed to assess on each member a sum not exceeding double the amount by him paid by way of premium and deposit, and the same assessment publish in two or more newspapers in Boston. They shall then

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collect the said assessment without delay; and in thirty days after such notice shall have been given, they shall actually proceed in due form of law against each delinquent, and thereby be completely exonerated. In case of neglect, they may be subjected to the penalty expressed in the act of incorporation. In the case of neglect to pay said assessment, such delinquent's policy or policies shall cease and determine until payment is made, with interest, and such reasons given for the delay as shall be satisfactory to the president and directors."

The contract between each policy holder and the other members of the corporation, contained in the policy and the rules, is not an absolute contract of indemnity such as is usual in a policy issued by companies having specific capitals. It contemplates that losses are to be paid in thirty days after notice, if the absolute funds are sufficient for that purpose; but if they are insufficient, it only requires that the insurers shall make an assessment according to the twenty-sixth rule, for the purpose of paying them in full, or in part, if the whole funds are not sufficient to pay in full. If the corporation, through its officers, proceeds to make an assessment in accordance with the twenty-sixth rule, and pays the losses sustained, it does all that the contract with the insured requires of it. There is no laches or neglect to perform the contract which renders it liable to pay interest as damages for the detention of the money of the insured beyond the time when it is payable by the contract.

The provision of the twenty-first rule, that payment of losses shall be made in thirty days after notice, cannot apply to losses which make it necessary to resort to the contingent fund, because it is clear that it is not contemplated by the twenty-sixth rule that assessments can be made and collected within the thirty days. We are of opinion, therefore, that, upon the fair construction of the contract contained in the policy and rules of the company, where losses occur which absorb the absolute funds and require an assessment upon the contingent liability of the members, the insured who have sustained losses are not entitled to interest thereon. It follows that the receivers cannot pay interest upon the losses which occurred before the assessment was laid.

2. It appears that there are about fifty policies which have not been formally cancelled, and which were issued for a term of

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years which has not yet elapsed, but on which the assessment remains unpaid; and the second question presented by the petition of the receivers is, "Whether any of said uncancelled policies are to be treated as subsisting policies, and whether any money shall be reserved for the payment of losses which may hereafter occur thereon.

The proceedings under the statute are in the nature of proceedings in insolvency, the object of which is to close up the affairs of the corporation as speedily as possible. This object would be defeated if the fund in the hands of the receivers is liable for future losses, for the fund could not be distributed until the longest policy had expired by lapse of time. The decrees of the court perpetually enjoining the corporation from further proceeding with its business, and sequestering all its property, deprive the corporation and its officers of the power to provide for any future losses. Each holder of a policy is a member of the corporation, and as such has notice of and is affected by the injunction. It is an incident of the peculiar contract and relation which each member of a mutual insurance company enters into with the other members, that the injunction and judicial sequestration of all the property of the corporation terminates its liability for future losses.

For these reasons, without considering other grounds of objection, we are of opinion that the funds in the hands of the receivers are not liable to pay any losses which might occur after the judicial sequestration of the property of the company, and therefore that no part of the fund should be retained for the purpose of meeting such losses.

3. The third question is, whether the surplus in the hands of the receivers should be repaid to persons who have paid in full the sums assessed upon them, or shall be paid to holders of unexpired policies on account of claims for the value of unexpired terms or unearned premiums.

The twenty-fifth article of the rules provides that "the absolute fund of the company shall be and hereby is appropriated to the payment, 1st, of expenses; 2d, of losses by fire; 3d, of returns of premiums and deposits, and of dividends on policies expired." The twenty-sixth article, above quoted, provides that, in case losses should happen so as to absorb the absolute fund,

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an assessment shall be made upon the members. Under this provision, the liability to assessment is measured by the amount of the just claims for losses for which the company is then responsible. Neither this nor any other provision of the rules or of the contract authorizes an assessment for the purpose of paying the value of unexpired policies or unearned premiums. *Commonwealth* v. *Massachusetts Ins. Co.* 112 Mass. 116. *Commonwealth* v. *Mechanics' Ins. Co.* 112 Mass. 192.

The surplus in question results from the fact that the directors made an assessment larger than was necessary for the purposes for which an assessment was authorized. The payments of the excess were required and made under a mistake of fact, and we are of opinion that such surplus should be repaid to the members who have thus paid more than they were required by law to pay.

A decree is to be entered accordingly upon the petition of the receivers for instructions, and the petition of George W. Taylor is to be dismissed. *Decrees accordingly.*

MARK C. FELCH *vs.* DAVID HOOPER & another.

Middlesex. Jan. 12. — Oct. 23, 1875. AMES & ENDICOTT, JJ., absent.

Where a person, who has entered into a written contract for the purchase of land, has paid or tendered the consideration, and by the owner's permission has entered upon the land and made improvements thereon, the land is charged with an implied trust in his favor; and a court of equity may, if the owner has never been a resident of this state, and no service is made upon him here, appoint a trustee, under the Gen. Sts. *c.* 100, § 15, to convey the same in such manner as it may require.

BILL IN EQUITY filed December 2, 1873, against David Hooper and Matilda H. Hooper, of Portland, in the State of Maine, alleging the following facts:

On August 16, 1873, David Hooper executed and delivered to the plaintiff a bond, a copy of which was annexed to the bill, and was as follows:

"Know all men by these presents that I, David Hooper, of Portland, county of Cumberland and State of Maine, am holden and stand firmly bound unto Mark C. Felch, of Somerville, county

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of Middlesex and State of Massachusetts, in the sum of five thousand dollars, to the payment of which to the said obligee or his executors, administrators or assigns, I do hereby bind myself, my heirs, executors and administrators.

"The condition of this obligation is such that whereas the said obligor has agreed to sell and convey unto the said obligee a certain parcel of real estate situated on Wallace Street, in Somerville, aforesaid, and bounded as follows, [describing it.]

"The same to be conveyed by a good and sufficient warranty deed of the said obligor, conveying a good and clear title to the same, free from all incumbrances.

"And whereas for such deed and conveyance it is agreed that the said obligee shall pay the sum of eighteen hundred dollars, of which one hundred and fifty dollars are to be paid in cash upon the delivery of this bond, and the remainder, bearing interest after sixty days at the rate of eight per cent. per annum.

"Now therefore if the said obligor shall, upon tender by the said obligee of the aforesaid cash at any time within ninety days from this date, deliver unto the said obligee a good and sufficient deed as aforesaid, then this obligation shall be void, otherwise it shall be and remain in full force and virtue."

On the delivery of the bond the plaintiff paid to David Hooper the sum of $150, as required by the terms of the bond.

In view of the sale made to him as aforesaid and soon after the execution and delivery of the bond, David Hooper verbally authorized the plaintiff to enter upon the land and erect dwelling-houses thereon in such manner as the plaintiff might deem fit and proper, and thereupon the plaintiff proceeded to erect such buildings and has almost completed one house on one of said lots, and has laid the foundation of another house on the other lot, and has laid out and invested therein a large sum of money, in the whole, nearly $2,500.

At and before the expiration of the ninety days mentioned in the bond, which expired on November 14, 1873, the plaintiff was ready to pay the balance of the purchase money, as therein provided; but as Hooper had not paid the annual taxes assessed upon the land by the city of Somerville on May 1, 1873, which constituted an incumbrance thereon, and did not pay the same until November 21, he could not before said last named day have given

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a deed of conveyance in accordance with the terms of the bond. On that day, immediately after the payment of the taxes by David Hooper, the plaintiff offered and tendered to him the whole balance of the purchase money for the land then remaining due to him according to the terms of the bond, and demanded from him a conveyance of the land which David Hooper refused.

The bill then averred on information and belief that afterwards on the same day, Hooper caused a deed to be recorded in the registry of deeds, purporting to be a conveyance of the land from him to the defendant Matilda H. Hooper, his mother; that this conveyance was merely colorable and without consideration, and made with the fraudulent intention of compelling the plaintiff to pay an increased price for the land or to lose the buildings which he has erected thereon.

The prayer of the bill was that the defendants be ordered by a decree of the court to execute, acknowledge and deliver to the plaintiff a deed of conveyance in conformity with the terms of the bond, on payment of the balance of the purchase money; and for further relief.

On December 6, 1873, an attested copy of the bill was served on the defendants at Portland, in the State of Maine.

On February 2, 1874, the defendants demurred to the bill on the ground that the court had no jurisdiction over them.

On February 17, 1874, the plaintiff filed an amendment to the bill, alleging that the contract by which David Hooper sold the land in question to the plaintiff, was entered into and concluded between the latter and an agent of David Hooper in Somerville, and was intended to be carried out in this Commonwealth; that David Hooper was at Somerville in person at the time when the taxes were paid by him and when the offer and tender of the balance of the purchase money were made to him by the plaintiff; that on the same day, David Hooper acknowledged the deed to Matilda H. Hooper, before a justice of the peace in said county of Middlesex, and caused the same to be placed on record while Matilda H. Hooper was at her home in Portland; that since that time the defendants have pretended that David Hooper had actually sold the land to Matilda H. Hooper, but David Hooper has proposed and offered that if the plaintiff would pay a sum much larger than the price stipulated for in the bond, he would

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procure a conveyance of the land from Matilda H. Hooper to him; that after the execution and delivery and recording of said bond and a payment of a part of the purchase money as therein provided, and especially after the said tender of the remainder of the purchase money, which he is and has been ready to pay, the said David Hooper held and the said Matilda H. Hooper now holds the title to said land, and is seised thereof upon a trust for the benefit of the plaintiff; that the defendants have constantly and fraudulently refused to make a conveyance thereof to him, though often requested so to do, unless he would pay a large sum in addition to the price agreed upon; and now, in pursuance of a fraudulent scheme by them conceived to compel the plaintiff to pay an increased price for the land or lose the improvements he had made thereon by consent of David Hooper, before the time when he should have conveyed the same to the plaintiff, and also lose that portion of the purchase money paid on delivery of the bond, the defendants, though duly notified of this suit, refuse to answer the plaintiff's bill and refuse to submit themselves to the jurisdiction of this court, and remain obstinately without the Commonwealth.

The prayer of the amended bill was that the said land may be decreed to belong beneficially to the plaintiff, and that some proper person may be appointed and authorized to convey to him the legal title thereof, and that the balance of the purchase money now remaining in his hands, after deducting therefrom the costs of this suit, may be safely deposited or invested under the direction of this court, to be paid over or transferred to the defendants, only upon the execution and delivery by them of a proper deed or deeds to convey or confirm the title of said land to the plaintiff, and for further relief.

The defendants thereupon demurred to the amended bill, assigning as ground of demurrer "that it appears by the plaintiff's own showing that this court has no jurisdiction of the parties defendant in this bill or either of them, and that there has been no legal and sufficient service of the same on said defendants or either of them to authorize this court to take jurisdiction therein."

The case was reserved by *Colt*, J., for the consideration of the full court, upon the bill as amended and the demurrer.

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A. C. Buzzell, for the defendants. Neither of the defendants is, or ever has been, an inhabitant of this state, nor, at the time this bill was filed, was either within this state, nor was any service made on either of them within the jurisdiction of this court. Under such circumstances, this court has decided that a bill for the specific performance of a contract to convey land within the state, cannot be maintained. *Spurr* v. *Scoville*, 3 Cush. 578. *Moody* v. *Gay*, 15 Gray, 457.

The bill does not show the existence, at any time, of such a trust as is contemplated by the Gen. Sts. *c.* 100. That statute was intended to apply only to trusts formally created by deed, or raised by necessary intendment in wills, and has no reference whatever to contracts like this, or to constructive or resulting trusts, the existence of which is in doubt or disputed, as in the case at bar. It was not intended to apply where issues of fact are to be tried, but only where the trust relation is conceded. Where such issues are to be tried, the court must have jurisdiction of the person. The "sale" and "conveyance" referred to in the statute, relate to sales for reinvestment and conveyance for that purpose, or to trustees not under the disabilities named in § 15. The Legislature practically adopted this view in giving Probate Courts original jurisdiction "over all matters relating to the sale of trust estates, of which the Supreme Judicial Court now has exclusive jurisdiction." St. 1869, *c.* 331. *Dana* v. *Petersham*, 107 Mass. 598, 602. Perry on Trusts, §§ 25–27.

G. W. Park & G. F. Piper, for the plaintiff.

COLT, J. The question raised by this demurrer is not whether a contract for the conveyance of land in this Commonwealth can be specifically enforced against a defendant upon whom no service is made within this state, and who is not and never has been a resident. That question was decided in the case of *Spurr* v. *Scoville*, 3 Cush. 578.

The question here is whether under such a contract in writing the plaintiff who has paid or tendered the consideration, and has by the defendant's permission entered upon the land and made improvements thereon, can under our statutes, upon the allegations of this bill, enforce his equitable title to the land in any form.

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In *Spurr* v. *Scoville*, it was said that the only effectual decree, which could be rendered upon the allegations in that case, would require a conveyance of the land in question by the defendant personally; and that courts of equity would not proceed in a cause, where the decree asked for required an absent defendant, not subject to their jurisdiction, to be active in its performance, but could deal only with persons who could be compelled by process to obey their orders. The decision is placed expressly on the ground that the suit was a proceeding *in personam* merely, in which no decree was sought against the property, and no allusion is made to statutory provisions which upon proper allegations might perhaps have afforded relief.

The case at bar differs in this respect, and the plaintiff seeks to enforce an equitable right in the land itself. The bill, as amended, avers that the contract relied on and the payment and other facts alleged were sufficient to charge the land with a trust in the plaintiff's favor, which the defendants refused to perform by refusing to make the required conveyance. And a prayer is added that the land may be decreed to belong beneficially to the plaintiff, and may be conveyed to him by some person duly appointed by the court. To the bill as amended there is a special demurrer on the ground that the court has no jurisdiction of the parties.

The doctrine is well established in equity that from the time a valid contract for the sale of land is made, that which ought to have been done is treated, as between the parties, as already done; and the seller and his representatives, and subsequent purchasers from him with notice, will be held to be trustees for the purchaser, for the purpose of affording the latter a remedy against the estate. *Atcherley* v. *Vernon*, 10 Mod. 518, 527. *Daniels* v. *Davison*, 16 Ves. 249, 255. *Waddington* v. *Banks*, 1 Brock. 97. Lewin on Trusts, (3d ed.) 174, 175.

Our statutes give this court power to enforce the performance of a contract for the sale of land, made by a deceased person, and to order the executor or administrator to make a conveyance, which it is declared shall have the same force and effect as if made by the person who made the agreement to convey, thus giving effect to the deed of the legal representative although the legal title is in the heirs at law, and treating the subject matter

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of the contract as personal or real, according to the character which has been given to it by its terms. Gen. Sts. *c.* 117, §§ 5, 6.

Upon the facts stated in this bill, the land in question is charged with an implied trust in the plaintiff's favor; and the court is not powerless to enforce that trust, merely because the parties holding the legal title are beyond its reach. It is said that courts of equity will never allow a trust to fail for want of a trustee. Such a trustee this court is now authorized to appoint, by a statute which provides that when a person, seised of an estate upon a trust express or implied, is out of the Commonwealth, or not amenable to the process of any court therein having equity powers, this court shall have power to order a conveyance to be made thereof in order to carry into effect the objects of the trust, and may appoint some suitable person in the place of the trustee to convey the same in such manner as it may require. Gen. Sts. *c.* 100, § 15.

This statute expressly includes implied trusts, and cannot be confined in its application to trusts which are created by deed or will and do not depend upon the proof of facts which may be open to dispute. *Walsh* v. *Walsh*, 116 Mass. 377. Most implied trusts are of the latter description. The statute gives the court power to render an effectual decree, and that is enough to sustain the jurisdiction when the parties or the subject matter are within its reach. *Ward* v. *Arredondo*, Hopk. Ch. 213. The decree will be binding on absent parties to the extent of its effect on the land only, even though all parties interested have been notified in accordance with the rules of court. In other states, under similar statutes, similar relief is granted. *Matteson* v. *Scofield*, 27 Wis. 671. *Rourke* v. *McLaughlin*, 38 Cal. 196.

Upon this demurrer the existence of the trust must be assumed, and the entry must be ***Demurrer overruled.***

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WILLIAM HANLAN'S CASE.

Plymouth. October 19. — 20, 1875. AMES & MORTON, JJ., absent.

If the sureties, on a bond given by the respondent on a complaint under the bastardy act for his appearance in the Superior Court, and to abide the order of the court thereon, surrender their principal in the Superior Court, that court has no authority under the Gen. Sts. c. 72, §§ 4, 5, to order the respondent to be committed to abide the further order of the court, but only to order him to give a new bond and to stand committed until he complies with that order.

HABEAS CORPUS. The petitioner, who was arrested November 9, 1874, upon a warrant issued by the Second District Court of Plymouth, upon the complaint of Mary McQueeney under the bastardy act, was brought before that court and there gave bond with surety for his appearance to answer the complaint in the Superior Court, and abide the order of the court thereon. At the return term of the Superior Court, the surety in the bond surrendered his principal in open court, and he was committed to the Plymouth County Jail under an order of the Superior Court "to abide the further order of the court," and was there held in custody under this order until July 22, 1875, when he made application to *Wells*, J., for a writ of *habeas corpus*, and the writ issued accordingly to the keeper of the jail.

Upon these facts the judge reported the case to the full court, such order to be made therein as law and justice might require.

C. A. Williams, for the petitioner.

J. F. Simmons, *contra*.

DEVENS, J. The bond which may be required by the court or justice in a process of this character under the Gen. Sts. *c.* 72, § 4, for the appearance of the respondent at the Superior Court, is to remain in force until final judgment. Gen. Sts. *c.* 72, § 5. But it is further provided by § 5, "that if the sureties in the bond at any term of said court object to being longer held liable, or if the court for any cause deems it proper, the court may order a new bond to be taken; and the defendant shall stand committed until he gives such new bond."

This provision does not enable the sureties in such a bond to discharge themselves, as the sureties in a bail bond at common law may, by a surrender of their principal in open court, or as

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the sureties may in a bond taken for the appearance of the defendant before the court or magistrate by whom the preliminary examination in a complaint of this character is made. St. of 1863, *c.* 127, §§ 1–3. It contemplates an action by the court upon the objection by the sureties to being longer held liable, and an order thereupon for a new bond, and for the principal to stand committed until he gives such new bond. Until this action is taken by the court, the bond originally given continues in force.

In the present case no new bond was ordered. The petitioner was not committed for failing to furnish such new bond, but simply to abide the further order of the court. For such a commitment no authority is found in the statute. The authority of the court to act is derived solely from the statute; the provisions for a bond and for the action which may be taken in reference to it being entirely statutory in their character. To warrant the commitment there should first have been an order to give a new bond, and the commitment should have been made for non-compliance with such order. *M'Hugh, petitioner*, 3 Cush. 452.

Petitioner discharged.

NATHAN S. GIBBS & wife *vs.* NATHANIEL F. AMES.

Plymouth. October 19. — 22, 1875. AMES & MORTON, JJ., absent.

In an action of tort by a husband and his wife for a malicious prosecution of the wife, it appeared that the defendant made a complaint on oath before a trial justice, accusing the wife of larceny, and the husband of inciting and commanding the wife to the crime, and praying for the arrest of the husband; that the warrant was for the arrest of the husband only; that both were brought from another state on a requisition from the governor of this Commonwealth, and were arrested and brought before the justice; that the wife was required to plead to the complaint, to answer further thereto at a subsequent day, and to give surety for her appearance for that purpose, and in default of bail was committed to jail, and on the day fixed for the trial was discharged, being found by the magistrate to be not guilty. The jury were instructed that the making of the complaint did not of itself render the defendant liable for the subsequent arrest and imprisonment of the wife; but that if he intended and participated in her arrest and imprisonment upon the complaint, the requisition or the warrant, he was, if and so far as her arrest and imprisonment were caused by such acts of his, done with malice and without probable cause, liable in damages therefor in this action. *Held*, that the action could be maintained as for malicious prosecution, and that the instructions were correct.

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TORT. The declaration alleged that the defendant falsely, maliciously, wilfully and wrongfully prosecuted the female plaintiff, and falsely charged her with the crime of larceny of bonds, to the value of six thousand dollars, and of other personal property, the property of the defendant; and wrongfully and maliciously removed her by force from the State of Maine, and caused her to be removed, she being at the time about to be confined in childbed, and wrongfully imprisoned, and caused her to be imprisoned for more than ten days, expecting every moment to be confined in childbirth, and the defendant well knowing that said charge was false; whereby the female plaintiff suffered great damage in anxiety of mind, in helplessness and destitution, and was otherwise greatly wronged and damaged.

The answer contained a general denial, and alleged that whatever the plaintiffs may show that the defendant did in the premises, he did acting in good faith, upon probable cause that the female plaintiff had done and was guilty of all she was charged by him with doing, and acting under the advice of counsel learned in the law; and that the plaintiffs have no cause of action against him in the premises.

Trial in this court before *Gray*, C. J., who, after verdict, reported the case for the determination of the full court in substance as follows:

The plaintiffs' counsel contended that this action could be maintained not only as an action for malicious prosecution, but also, under the present declaration, as an action for false imprisonment; but it was ruled that the plaintiffs could not recover under this declaration without proving that the defendant had prosecuted the female plaintiff maliciously and without probable cause.

The evidence introduced tended to prove the following facts: The defendant, with his wife, resided at Mattapoisett. The female plaintiff was their daughter, and resided with her husband at New Bedford. On October 27, 1873, in the absence of the defendant, the daughter came to his house, and, while she was there, the defendant's wife took from the house $6000 of bonds belonging to him, and some furniture, part of which belonged to him and part to her, went with her daughter to the house of the latter in New Bedford, there left the furniture, thence went with

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her daughter, and carrying the bonds with them, to New York, and afterwards joined the daughter's husband at Augusta, in the State of Maine, where he had been from before the time of said taking, and they then took up their residence together there. The defendant, upon discovering this, went to Augusta, and after some conversation with his wife and son in law returned to Massachusetts to get a requisition from the governor against the daughter and her husband for larceny of the bonds and furniture; took advice of counsel here, with a view to arrest both; applied to Jonas R. Perkins, a trial justice of this county, for a warrant against both; signed a complaint drawn up by the justice, (a copy of which, together with the warrant issued thereon, and the record of the trial justice, was made part of the report, and the substance of which is printed in the margin; *) took the com-

* The complaint, dated February 25, 1874, alleged that Sophia E. Gibbs on October 27, 1873, feloniously took and carried away in the daytime certain personal property of the complainant of the value of $6000; and that Nathan S. Gibbs, before the felony and larceny were committed, incited, moved, procured, counseled, hired and commanded said Sophia to commit the said felony and larceny. The complaint concluded as follows: "He therefore prays that the said Nathan S. Gibbs may be apprehended and held to answer to said complaint, and dealt with relative to the same as law and justice may require." The warrant issued on this complaint directed the arrest of Nathan S. Gibbs. The record of the trial justice was as follows:

"On complaint of Nathaniel F. Ames *vs.* Nathan S. Gibbs. Plymouth, ss. March 3, 1874. By virtue of the within warrant, the respondents this day brought before me, a trial justice for said county, and the within complaint is read to them; and being asked whether they are guilty or not guilty of the offence therein charged against them, they say that they are not guilty. Continued to March 11th, Plymouth, in said county, at eleven o'clock, A. M. Ordered to give surety in $6000; in default, were committed. And on said eleventh day of March, after due and full consideration, it is considered by me that they are not guilty of said charge. It is therefore ordered that they be discharged."

The mittimus was as follows:

"Commonwealth of Massachusetts. Plymouth, ss. To the Keeper of the Commonwealth's Jail, in Plymouth, in the County of Plymouth. Greeting: You are hereby required to receive into your custody, for safe keeping, the bodies of Sophia E. Gibbs and Nathan S. Gibbs, who stand before me, charged by Nathaniel F. Ames with the crime of larceny, and who are remanded for further examination, to be had before me, at office in Plymouth, in said county of Plymouth, on Wednesday, the eleventh day of March, instant, at eleven

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plaint and warrant to the office of the state police in Boston; there signed an affidavit, setting forth substantially the facts which now appear by the evidence, and also that he had made a complaint before a trial justice, charging both Nathan S. and Sophia E. Gibbs with stealing said furniture and bonds, and had obtained a warrant for their arrest; went to the attorney general and stated his case to him, and obtained from him a letter to the governor, advising that on this complaint and affidavit a requisition might issue for both plaintiffs; had an interview with the governor, and obtained from him a requisition for both; delivered it to two officers of the state police; told them that his object was to arrest both plaintiffs; went with the officers to Augusta, and there, acting in concert with them, obtained a warrant from the governor of Maine to the city marshal of Augusta for the arrest of both, and procured their arrest, and arranged with the officers that the hearing here upon said complaint should be postponed for a week or ten days, until he returned from Maine.

The officers, having both plaintiffs in their custody, left Augusta and returned to Massachusetts, and on March 3, 1874, lodged them in jail at Plymouth, and directed another state constable to take them before a trial justice, and because the case was not fully prepared, and the witnesses not all ready, to get a postponement of the case until March 11; and this officer, acting under these directions, brought them before a trial justice, represented to him that the government was not ready to proceed, and procured from him a postponement of the case until March 11, an order that they should recognize for their appearance at that time, and upon their failure to furnish sureties, a warrant, for their commitment to jail in Plymouth, where they were detained until that day.

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o'clock, A. M., unless they shall before recognize to the Commonwealth, with sufficient sureties, in the sum of six thousand dollars each, for their personal appearance at said time and place, and for the purpose above mentioned. Witness my hand and seal, this third day of March, A. D. 1874.

"Otis W. Soule, Trial Justice." [Seal.]

On this was the following return: "Plymouth, ss. Plymouth, March 3, 1874. In obedience to the within warrant, I have conveyed the within named Sophia E. and Nathan S. Gibbs to the jail in Plymouth, in said county, and delivered them to the keeper thereof, with an attested copy of this warrant

"Jas. B. Collingwood, Constable of the Commonwealth."

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The defendant remained with his wife for a week in the plaintiffs' house at Augusta, and on March 9 returned to Massachusetts, saying at that time, to a witness who testified at the trial of this action, that he had got his daughter and her husband both in jail, and could keep them there till he got his bonds.

He arrived at Plymouth on the same day, and took no steps to bail or discharge them until March 11, when he applied to the trial justice for their discharge, and being examined upon oath before him, said that he had his daughter arrested and imprisoned for the purpose of getting into her house and seeing his wife, and that his object was to get the plaintiffs away so as to have access to his wife, and get the bonds, and that he was now satisfied that his daughter and her husband had nothing to do with taking the bonds and furniture, and he wished "to lift the thing" from her. Both plaintiffs were therefore discharged by the justice, and immediately brought this action.

No complaint was made or warrant issued against the female plaintiff otherwise than as above stated.

The defendant contended, and requested the judge to instruct the jury, that there had been no prosecution of the female plaintiff, for or by reason of which this action could be maintained; and that if this action could be maintained at all, he could not be held liable for any damages resulting to her from the imprisonment from March 3 to March 11.

The jury were instructed that the making of the complaint to the trial justice did not of itself render this defendant liable for the subsequent arrest and imprisonment of the female plaintiff; but that if he intended and participated in her arrest and imprisonment upon the complaint, the requisition or the warrant, he was, if, and so far as, her arrest and imprisonment were caused by such acts of his, done with malice and without probable cause, liable in damages therefor in this action.

The jury returned a verdict for the plaintiffs. Judgment was to be rendered on the verdict, or judgment for the defendant, or a new trial ordered, as, in the opinion of the full court, law and justice might require.

G. Marston, for the defendant. 1. To maintain this action, it must appear that the female plaintiff was prosecuted by the defendant. The word "prosecuted" is technical, and means only

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the use of legal process against the party, as a party defendant, which must be at an end, and is to be proved by copies of the record. 2 Greenl. Ev. §§ 449, 450, 452. A prosecution can never be said to be at an end if it never was begun, and the proceedings cannot be shown from a record if there never was any proceeding which resulted in a judgment and a record thereof. "There is no similitude or analogy between an action of trespass, or false imprisonment, and this kind of action. An action of trespass is for the defendant's having done that, which, upon the stating of it, is manifestly illegal. This kind of action is for a prosecution which, upon the stating of it, is manifestly legal." *Johnstone* v. *Sutton*, 1 T. R. 510, 544.

2. There never was any prosecution of the female plaintiff; there was no complaint against her in which process was sought against her, and no warrant was ever issued against her. She never was arrested on any warrant issued upon any complaint against her. The complaint only charges the husband with the crime, and prays process only against the husband. The warrant is only for the arrest of the husband; and so the prosecution is only of the husband. It ought to appear that the plaintiff "was acquitted of the charge." 2 Greenl. Ev. § 452. That is not possible in a case where no process has been issued upon which she could have been put upon trial. If the defendant is liable at all, it is for false imprisonment, or trespass, and not in this action.

3. The commitment of the wife by the trial justice was wholly illegal, and was in no sense a legal process under the complaint and warrant which were before the trial justice. The defendant cannot be held liable for damages resulting from an unauthorized and extra-judicial act of the trial justice.

C. G. Davis, for the plaintiffs.

WELLS, J. The female plaintiff was brought before a trial justice upon a criminal charge. She was required to plead to the complaint, to answer further thereto at a subsequent day, and to give surety in $6000 for her appearance for that purpose. In default of bail she was committed by order of the magistrate, and a mittimus therefor in due form was issued. Upon the day fixed for the trial she was discharged, the magistrate finding and adjudging her to be "not guilty of said charge." All this appears from the records of the trial justice.

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This was a sufficient prosecution and acquittal therefrom to furnish a foundation for the common action for malicious prosecution, notwithstanding any insufficiency of the complaint, or defect of process by which she was brought before the court, or want of jurisdiction of the magistrate arising from such defect. 2 Greenl. Ev. §§ 449, 452, and cases cited. 1 Am. Lead. Cas. (4th ed.) 215, 216, notes to *Munns* v. *Dupont*. *O'Brien* v. *Barry*, 106 Mass. 300, 304. *Cardival* v. *Smith*, 109 Mass. 158. The magistrate had jurisdiction of the subject matter of the complaint, which was not the case in *Bixby* v. *Brundige*, 2 Gray, 129, and *Whiting* v. *Johnson*, 6 Gray, 246.

Ordinarily the preferring of a complaint, if done maliciously and without probable cause, would be sufficient to charge the complainant with liability for the prosecution to which it gave rise; because that is its natural and legitimate sequence, and its presumed purpose. But the form of this complaint is such that, as it prayed for process only against the other person named as an offender, some other evidence was rightly required to charge the defendant with an intention to prosecute the female plaintiff. The instructions required the jury to find that the defendant intended to cause, and participated in, her subsequent arrest. That fact, being found, involves him in responsibility for the subsequent proceedings as its natural and ordinary sequence, just as much as if there had been a proper complaint and warrant to justify the arrest, as he asserted in his affidavit that there were. 2 Greenl. Ev. § 450.

Judgment on the verdict.

Isaac N. Damon *vs.* Inhabitants of Scituate.

Plymouth. October 19. — 22, 1875. Ames & Morton, JJ., absent.

In an action against a town for an injury sustained by a defect in a highway, the mere fact that the injury was sustained while the plaintiff was attempting to pass in his carriage another carriage travelling in the same direction, in violation of a statute, does not as matter of law defeat the action, if his own fault or negligence did not contribute to the injury; but it is competent evidence of negligence on his part to be submitted to the jury.

Tort for personal injuries and for injuries to the plaintiff's horse and carriage, occasioned by an alleged defect in a highway

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which the defendant was bound to keep in repair. Answer, a general denial.

At the trial in the Superior Court, before *Rockwell*, J., it appeared that the injuries were sustained by the carriage going off of a bridge over a culvert, the bridge not being protected by a railing, while the plaintiff, who was driving, was attempting to pass, on the right hand side of the road, another carriage travelling in the same direction.

There was no evidence that the plaintiff requested the other carriage to give him room to pass, and its driver being called by the plaintiff testified without contradiction, that the first he knew of the plaintiff's whereabouts, was that he heard the sound of wheels on the stones; directly saw the plaintiff's horse abreast of him; thought there was not room for him to pass; turned his own horse to the left, and immediately heard a crash.

The defendant called the attention of the court to and read the Gen. Sts. *c.* 77, §§ 2, 4, and asked the judge to instruct the jury as follows:

"That the plaintiff, to maintain his case, must show that he was in the exercise of due care; that attempting to pass the carriage on the right hand side of the road is evidence tending to show want of due care, and, unless justification thereof is shown, is conclusive evidence of want of such care.

"That the plaintiff, to maintain his case, must show that he was in the exercise of due care; that attempting to pass the carriage on the right hand side of the road is evidence tending to show want of due care, and, unless justification therefor is shown, is conclusive evidence of want of such care; and that the burden of showing such justification is upon the plaintiff.

"That the town is obliged to maintain its road only for persons lawfully travelling thereon; that the plaintiff at the time the accident occurred was not lawfully travelling on the defendant's road, and the defendant is not responsible for any injuries at such time received by him."

The judge declined so to instruct the jury, and among other instructions not objected to, instructed them as follows: "That the plaintiff, to maintain this case, must show that he was in the exercise of due care, and must also show that the defendant was guilty of negligence; and that the accident was due to its negli-

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gence alone, and that he in no wise contributed to it; that the jury upon the question of due care on the part of the plaintiff, will consider the evidence in relation to his passing to the right of the preceding carriage, and whether or not the attempt to pass on that side is evidence of the want of due care; but in determining that question for the purposes of this case, the statute alluded to and read is immaterial, and the question is to be determined as if no such statute existed."

The jury found for the plaintiff; and the defendant alleged exceptions.

P. E. Tucker, (*B. W. Harris* with him,) for the defendant.

J. D. Long, for the plaintiff.

GRAY, C. J. The question at issue in this case was whether the injury to the plaintiff was caused solely by a defect in the highway, and in no part by his own negligence.

The mere fact that he was travelling on the wrong side of the road, in violation of the statute, did not as matter of law defeat this action, if his own fault or negligence did not contribute to the injury. But it was competent evidence of negligence on his part, to be submitted to the jury. *Smith* v. *Gardner*, 11 Gray, 418. *Spofford* v. *Harlow*, 3 Allen, 176. *Jones* v. *Andover*, 10 Allen, 18, 20. *Steele* v. *Burkhardt*, 104 Mass. 59, 61.

The instruction of the learned judge, that the statute was immaterial, and that the case was to be determined as if no such statute existed, was therefore erroneous, in withdrawing from the consideration of the jury an element which, if they had been permitted to consider it, might have had some weight in their determination of the question whether the plaintiff, in attempting to pass the other carriage on the wrong side of the road, used such care as was required of him under the circumstances in which he found himself. ***Exceptions sustained.***

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MILLARD E. BROWN *vs.* ABINGTON SAVINGS BANK.

Plymouth. October 28.—30, 1875. WELLS, COLT & MORTON, JJ., absent.

In an action against a savings bank, on an account annexed, to recover the amount of a deposit, the book of deposit is admissible in evidence at least to show the amount of the plaintiff's money received by the defendant, although the book contains printed conditions of deposit and payment.

Exceptions which are certified by the judge, who presided at the trial, not to have been saved or taken at the trial are not open in this court.

CONTRACT on an account annexed, to recover $793.23 and interest, money had and received to the plaintiff's use. At the trial in the Superior Court, before *Aldrich*, J., the jury returned a verdict for the plaintiff, and the defendant tendered to the judge a bill of exceptions, in substance as follows:

The plaintiff had given the defendant notice to produce at the trial the book of deposit numbered 2,890, containing an account of deposits and interest accrued thereon, in the name of the plaintiff, the items being the same contained in the account annexed to the plaintiff's declaration, together with printed conditions of deposit and payment. The defendant's counsel stated that they had the book in court, but objected to producing it. The judge ruled that refusal to produce the book would entitle the plaintiff to introduce secondary evidence of its contents. The book was handed to the plaintiff's counsel, the defendant reserving an objection to its admissibility, and protesting that neither the book nor its contents were admissible as evidence under the declaration. The judge overruled the objection, and admitted the book, to which the defendant thereupon excepted. The book was then used throughout the trial, and went to the jury.

The defendant produced an order signed by the plaintiff, addressed to the treasurer of the defendant corporation, as follows: "September 16, 1874. For value received pay to James Brown or order $793.22, on my deposit with said bank; and he is hereby authorized to receipt for the same in my name." There was evidence in the case tending to show that the plaintiff, when a minor, had signed said order in blank, and delivered it to his father, James Brown, who then had possession of the said deposit book,

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and given said James Brown authority to fill up said order; that said Brown went to the defendant bank and procured a loan, depositing said book as security therefor with the bank, and about seven months after the plaintiff became of age, said loan to said bank being then over due, the plaintiff delivered to said bank a notice, dated July 17, 1874, forbidding the bank to pay over the money on deposit in his name to any other person, and revoking any order previously given, and also a few days afterwards sent to James Brown a notice, dated July 23, 1874, revoking any order made during minority, and demanding any bank book or other evidence of debt in the possession of James Brown. James Brown (about two months after said notice was delivered to the bank) filled up said blank order with the amount, and dated the same, and the next day presented said order to the bank, and the amount of said deposits was thereupon paid to James Brown, and by him applied to the payment of notes to said bank, for which said book had been held as collateral, and said payment was entered in said deposit book. The treasurer of said bank testified that at the time of said payment upon said order, he supposed said order was executed upon the day of its date, and paid the same in good faith in the ordinary course of business.

Before proceeding to address the jury, the defendant's counsel asked the judge to rule, "that if the defendant paid the deposits in good faith upon the order produced, and entered such payment in the deposit book, any legal defect in the order, not brought to the notice of defendant at the time of such payment, will not avail the plaintiff as against such payment." The judge declined so to rule, but ruled, "that if the order upon which the payment was made was a forgery, the bank would not be protected, though the payment was made in good faith, without notice of the defect, and such payment entered in said deposit book." To which the defendant thereupon excepted.

The judge wrote and signed the following certificate on this bill of exceptions: "The first of the foregoing exceptions is allowed. The second exception is disallowed, on the ground that it was not saved or taken at the trial, until after the verdict had been returned."

P. Simmons & A. Mason, for the defendant. 1. The book of deposit was not admissible in evidence under the declaration

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The printed conditions of deposit and payment constituted a special contract which should have been declared on. *Wall* v. *Provident Institution for Savings*, 8 Allen, 96. Gen. Sts. *c.* 129, § 2, *cl.* 9.

2. The instruction was erroneous. *Levy* v. *Franklin Savings Bank*, 117 Mass. 448.

W. H. Osborne & H. Kingman, for the plaintiff.

BY THE COURT. The book of deposit was admissible in evidence, at least to show the amount of the plaintiff's money received by the defendant, and it does not appear to have been admitted for any illegal purpose. The exception to the instructions is certified by the presiding judge not to have been saved or taken at the trial, and is therefore not open to the defendant.

Exceptions overruled.

CHARLES E. GIFFORD *vs.* CATHERINE ROCKETT & trustee.

Bristol. October 26, 1875. WELLS & MORTON, JJ., absent.

Exceptions, alleged by the plaintiff in trustee process to a ruling in favor of an adverse claimant to the funds in the hands of the trustee, cannot be entered in this court before judgment has been rendered in the court below discharging the trustee for the amount allowed to the claimant.

TRUSTEE PROCESS begun in the Police Court of Fall River, where the principal defendant and the trustee were defaulted, and James Featherstone appeared as claimant of the funds in the hands of the trustee, and was adjudged to be entitled to the funds, and the plaintiff appealed. In the Superior Court, *Wilkinson*, J., ordered that the trustee be charged on his default in the court below, and found for the claimant in the sum of $55.01. No judgment was entered against the defendant. The plaintiff alleged exceptions to this order, which need not be stated.

A. N. Lincoln, for the plaintiff.

H. K. Braley, for the claimant.

GRAY, C. J. An adverse claimant of funds in the hands of a trustee is made a party to the suit, only for the purpose of being heard upon the question whether, and for what amount, the trus-

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tee shall be charged; he is entitled to be heard even if the trustee is defaulted; and he cannot, except in the matter of costs, have judgment in his own name against the plaintiff or the defendant or the trustee. Gen. Sts. *c.* 142, §§ 15, 16, 73. *Morrison* v. *McDermott*, 6 Allen, 122. *Boylen* v. *Young*, 6 Allen, 582. *Fuller* v. *Storer*, 111 Mass. 281. *Stockwell* v. *Silloway*, 113 Mass. 382. *Peck* v. *Stratton*, 118 Mass. 406.

If, as was admitted at the argument of these exceptions, the amount to which the claimant was held by the Superior Court to be entitled equalled the whole fund in the hands of the trustee, it may well be doubted whether the provision of the Gen. Sts. *c.* 142, § 13, that a person, duly summoned as trustee, who, not appearing or answering, is defaulted, shall be adjudged a trustee, could rightfully be applied to the case.

But that fact does not appear upon the record before us, and, however it may be, a ruling in favor of the claimant is no more than an interlocutory order; and, until it has been embodied in a judgment as between the plaintiff and the trustee, discharging the latter so far as the claimant is held to have maintained his claim, exceptions to the ruling cannot be entered in this court, because the record has not been completed and the case finally disposed of in the court below. *Safford* v. *Knight*, 117 Mass. 281. *National Bank of Clinton* v. *Taylor*, 117 Mass. 283, note.

The principal defendant having been defaulted in the Police Court, and not having appealed to the Superior Court, nor moved in that court to take off the default, the case might, as to him, be treated as finally disposed of, because nothing remained to be done to entitle the plaintiff to the formal judgment accompanying an award of execution, and the plaintiff could not have taken such judgment and execution without waiving his exceptions to any order discharging the trustee. *Jarvis* v. *Mitchell*, 99 Mass. 530.

But because the case does not appear by the record to have been finally disposed of in the court below as between the plaintiff and the trustee, the exceptions have been prematurely entered here, and must be *Dismissed.*

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MARTHA WALSH *vs.* JOSEPH L. MACOMBER.

Bristol. October 27, 1875. WELLS & MORTON, JJ., absent.

Land was conveyed by metes and bounds with a reservation to the grantor of a right of way over the granted premises, and a mortgage of the land was given back to the grantor, in which the land was described by the same metes and bounds as in the deed, and as "being the same premises conveyed thereby, this mortgage being part of the same transaction." The land was sold by the mortgagee for breach of condition under the power of sale in the mortgage and was described in the deed to the purchaser by the same metes and bounds, and as being the same described in the mortgage. No reservation was made or incumbrance mentioned in the mortgagee's published notice of sale. *Held*, that the last named deed did not convey the right reserved to the grantor in the original deed.

TORT for breaking and entering the plaintiff's close.

The answer of the defendant admitted the plaintiff's title to the close, but alleged that the same was subject to the right of the defendant to enter the close, and to pass to and from the well thereon for the purpose of obtaining water, and that in the proper exercise of that right he entered the close, and not otherwise.

At the trial in the Superior Court, before *Aldrich*, J., without a jury, the plaintiff put in evidence a deed of the said land, from the defendant to Henry E. Atwell, dated November 19, 1866, conveying the granted premises by metes and bounds, and containing the following clauses: "Together with a right of way over the passage way on the southeasterly side of the above described lot to and from the barn now standing on said premises. And the aforesaid grantor reserves the privilege of passing over said conveyed lot to and from the well to draw water. And the aforesaid grantee is to build and maintain the fence on the southeasterly line of said lot adjoining my remaining land, so long as I shall own adjoining."

The plaintiff also put in evidence a mortgage with a power of sale from Atwell to the defendant, dated November 19, 1866, in which the premises were described by the same metes and bounds as in the said deed, as "being the same premises which the aforesaid Macomber conveyed to me by his deed of the date hereof, this mortgage being part of the same transaction;" and a deed of the premises to the plaintiff from the defendant, reciting that the latter sold the same on breach of condition by virtue and in

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pursuance of the power of sale contained in the mortgage. This deed contained the same description by metes and bounds as the first named deed and the mortgage, and the following clause: "Being the same described in the above named mortgage of the said Henry E. Atwell to me, the aforesaid Joseph L. Macomber."

The affidavit of sale, signed by the defendant as mortgagee, was as follows: "I, Joseph Macomber, named in the deed hereto annexed, do hereby certify, on oath, that by virtue of the power mentioned and referred to in the said annexed deed, I did enter upon the mortgaged premises referred to in said deed, and did sell the same, and all equity of redemption of the said Henry E. Atwell, at public auction on the premises. Said sale was made on the twenty-ninth day of February, A. D. 1868, to Martha Walsh, for the sum of $1100, she being the highest bidder therefor; I gave notice of the time and place of said sale by publishing, three weeks successively, previous to said sale, in the Bristol County Republican aforesaid, a notice, of which the following is a true copy: 'Mortgagee's sale. By virtue of a power of sale contained in a mortgage from Henry E. Atwell to Joseph L. Macomber, dated November 19, 1866, the premises described therein will be sold at public auction on Saturday, the 29th day of February next, at three o'clock in the afternoon. Said premises are situated in the city of Taunton, on the southwesterly side of Summer Street, being a lot of land with the buildings thereon, bounded as follows,'" [describing the land by the same metes and bounds as in the mortgage.]

The plaintiff did not contend that the defendant, if he had a right of way over the premises, did anything more than he properly might do in the usual exercise of that right, and admitted that her only title to the land was under the deed to her from the defendant.

The deed from the defendant to Atwell, and the latter's mortgage back, were recorded soon after their date and long before the deed to the plaintiff was given.

No question was made as to the executing of the deeds or regularity of the proceedings. The plaintiff contended and asked the judge to rule, as a matter of construction of these several deeds, that the defendant had conveyed by his deed to the plaintiff any right he had reserved in his original deed to pass over

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the premises to draw water; but the judge ruled as a proper construction thereof that he conveyed therein to the plaintiff no greater estate than he conveyed to Atwell in his original deed, and his reserved right to pass over her close and draw water still remained; and found for the defendant. To this ruling the plaintiff alleged exceptions.

J. Brown, for the plaintiff. By his mortgage deed, Atwell could lawfully convey no more than the estate he held; but by its terms he conveyed an unincumbered estate. If the defendant foreclosed, the easement would be merged. If he chose to sell in order to realize on his debt, he had the power to offer at public auction an unincumbered estate, which is of greater market value than one burdened with an easement, and the recovery of his whole debt by sale was better secured. He accepted the power to sell at public auction just such an estate as he could sell at private sale after foreclosure of a mortgage deed in which by apt words the easement had or had not been excepted. In executing the power of sale the mortgagee must convey his own title as well as that of the mortgagor. *Torrey* v. *Cook*, 116 Mass. 163.

In the publication of notice of sale, no reservation is made or incumbrance mentioned, even by implication. In his deed to the plaintiff, he conveys an unincumbered estate by metes and bounds. He had power to give the deed in his own name, or by attorney, or both. By fair construction of his grant after the recital of his doings and the statement that by virtue and in pursuance of the power of sale in the mortgage, he conveys his entire title in his own name, fully and effectually. *Brown* v. *Smith*, 116 Mass 108. After having done all this, it is too late for him to say that he did not intend to convey his easement. He cannot be aided by claiming under the reference or recital in the mortgage deed: "being the same premises which the aforesaid Macomber conveyed to me by his deed of the date hereof, this mortgage being a part of the same transaction." That it was a part of the same transaction could be shown as well by parol. The lot of land being described by metes and bounds as well as courses and distances, and in the precise words of Macomber's deed to Atwell, the reference neither adds to nor detracts from the grant, so far as third parties are concerned. It makes certain what was before

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certain. It is true, that when there is a deed and a mortgage back executed simultaneously and as part of the transaction, they must, as between the parties to them, be construed together, and in such a manner as to give full effect to both. But that rule is applied only where there is ambiguity or doubt. *Cloyes* v. *Sweetser*, 4 Cush. 403. *Pomeroy* v. *Latting*, 15 Gray, 435. Such a rule or practice has no effect here, where third parties are concerned, even if upon the facts disclosed it would affect the parties as between themselves, which is doubtful; for the reference would not make the mortgage deed include other premises, that were or might have been conveyed by Macomber's deed, not even the right of way mentioned unless it was necessarily appurtenant thereto. The reference has no stronger effect to except the easement from the grant than if Atwell had given a warranty deed to a third party with the same description, and substantially the same reference to Macomber's deed. It is not referred to for a more particular description, nor is it made a part thereof by any apt words. The argument that it was a part of the same transaction has no force, for the parties have plainly expressed in their deeds what they intended without ambiguity, and in such cases what is written is binding on both, and there is no call for extraneous aid to limit or enlarge what is plainly written and set forth in their instruments. If they intended more or less than the instruments show they should have expressed it.

If it is contended that a foreclosure or sale and conveyance by an assignee of the mortgagee would not have the effect to deprive the defendant of his easement, the answer is, that the mortgagee had a power coupled with an interest or title, the whole of which he sold and conveyed without reservation. He could and did divest himself of his easement. Perhaps a sale by an assignee of the mortgage would not affect it. *Merritt* v. *Harris*, 102 Mass. 326.

E. H. Bennett & W. E. Fuller, for the defendant, were not called upon.

By the Court. The deed to the plaintiff was an execution of the power in the mortgage, and passed all the mortgagee's title under the mortgage, as well as the mortgagor's equity of redemption. *Brown* v. *Smith*, 116 Mass. 108. *Torrey* v. *Cook* 116 Mass. 163. *Hall* v. *Bliss*, 118 Mass. 554. But it did not convey the

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independent right which had been reserved to the mortgagee as grantor in the original deed to the mortgagor.

Exceptions overruled.

BERNARD H. ALGER *vs.* INHABITANTS OF EASTON.

Bristol. October 27, 1875. WELLS & MORTON, JJ., absent.

An action of tort cannot be maintained against a town for the acts of its assessors and collectors in assessing and levying a poll tax upon a person not an inhabitant thereof, even if the assessors act with integrity and fidelity and are therefore by the Gen. Sts. c. 11, § 51, not themselves liable to an action.

TORT for assault and battery and false imprisonment. Trial in the Superior Court, before *Aldrich*, J., who allowed a bill of exceptions in substance as follows:

The plaintiff was assessed by the assessors of the defendant town, there being no want of integrity and fidelity on their part, for a poll tax for the year 1873. The assessors duly committed their tax list with their warrant to the collector of the defendant town. The collector afterwards duly issued a warrant to Rufus H. Willis, a deputy sheriff, residing in said town of Easton. The deputy, after due notice to the plaintiff, and for want of sufficient goods upon which to levy said tax, took the body of the plaintiff, and committed him to prison. The plaintiff paid the tax and costs on the following day and was discharged from imprisonment. The amount of the tax, which was two dollars, was afterwards paid into the town treasury by the collector.

The plaintiff admitted, and it appeared in evidence, that all the proceedings of the assessors, collector and deputy, were regular, and in legal and proper form; but contended and offered evidence tending to show that he was not an inhabitant of the town of Easton on May 1, 1873, and that he was then an inhabitant of West Bridgewater, an adjoining town, to which he moved in May, 1872.

The defendant asked the judge to rule, that if the plaintiff was not an inhabitant of Easton on May 1, 1873, and for that reason was improperly assessed by the assessors of the town, and

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arrested and imprisoned as before stated, yet this action could not be maintained against the town.

The judge declined so to rule, but submitted the case to the jury upon instructions not objected to.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

E. H. Bennett & H. J. Fuller, for the defendant, were stopped by the court.

J. Brown, for the plaintiff.

GRAY, C. J. This action cannot be maintained. The assessors and collectors, though elected by the inhabitants of the town, are not the agents of the town, but are public officers whose duties are prescribed by law. *Dunbar* v. *Boston*, 112 Mass. 75. If the tax was illegally assessed upon the plaintiff, his only remedy is by action of contract against the town to recover back the money paid. *Baker* v. *Allen*, 21 Pick. 382.

The plaintiff relies upon the case of *Durant* v. *Eaton*, 98 Mass. 469, in which, upon facts like those of the present case, an action of tort was brought against the assessors and collector and the officer who served the warrant; and Chief Justice Chapman said, "The statute which protects assessors from responsibility except for the want of integrity and fidelity on their own part, (Gen. Sts. *c.* 11, § 51,) throws the exclusive responsibility upon the town, and makes it responsible to the plaintiff if he can establish his case." But the question of the form of action against the town was not then before the court; and that the Chief Justice did not mean to say that the town would be liable to an action of tort is shown by the first words of his opinion, "The case of *Baker* v. *Allen*, 21 Pick. 382, is decisive of this case." See also *Loud* v. *Charlestown*, 99 Mass. 208.

Exceptions sustained.

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ELIZA A. TUCKER *vs.* JOHN A. TUCKER.

Bristol. October 26. — 28, 1875. WELLS & MORTON, JJ., absent.

In an action by the payee against the maker of a promissory note alleged to be dated July 1, 1869, for $1000 payable on demand, the evidence at the trial was that the plaintiff lent the defendant $1000 in July, in 1868 or 1869, and at the same time received from him a note, which had been lost and could not be produced. There was no evidence when the note was payable. *Held*, that the note might be presumed to be payable on demand, and that the evidence was sufficient, in the absence of evidence that any other note of that amount was ever given by the defendant to the plaintiff, to warrant the jury in returning a verdict for the plaintiff, and the court in rendering judgment in his favor, upon his filing a sufficient bond of indemnity.

The assignment by the payee of a promissory note of all his right therein, without any indorsement, does not prevent the maintenance of an action upon the note in the name of the payee.

CONTRACT upon a promissory note for $1000 dated Attleborough, July 1, 1869, payable on demand to the plaintiff and signed by the defendant. Writ dated December 18, 1873. The declaration alleged the following particulars:

On or about July 1, 1869, the defendant made and delivered to Eliza A. Tucker a promissory note for the sum of $1000, payable on demand to her order, which she soon after lost, and the same has never been found or paid. Afterwards she indorsed, transferred and assigned all her right, title and interest in said note to Annie F. Newell of said Attleborough.

The plaintiff offered to indemnify the defendant against any claims on account of said note by a sufficient and satisfactory bond of indemnity.

The answer alleged that if, upon the facts stated in the declaration, the defendant was indebted to any one upon the note, he was indebted to Annie F. Newell and not to the plaintiff; contained a general denial, and alleged payment.

At the trial in the Superior Court, before *Wilkinson*, J., the plaintiff testified as follows: "I reside in Attleborough. Know John A. Tucker. He is my son. I loaned him money in July, $1000, in 1868 or 1869. The same year I received it of Mr. Stanley. Received a note from him at the time I let him have the money. I can't find it. The last time I saw it was the time I gave up the company note. I have n't seen the note since the

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time I received it. I do not know what became of it. The note was given at the time he gave up the company note. Did not let him have the money at the time, but it was in consideration of giving up a company note. Interest was paid up to the time I took John A. Tucker's note. Have received no interest or principal since I let him have it. I have searched for the note a number of times where I have kept my papers, different places where I thought it could be found. I have searched in all the places where I keep my papers. Been unable to find it." On cross-examination she testified as follows: "Since I received this note I have received money, about $2000, of John A. Tucker. It was on another note." This was all the evidence in the case.

The defendant objected that this evidence was not competent and sufficient to warrant the jury in finding a verdict for the plaintiff, and requested the judge so to rule. The judge refused so to rule, and the case was submitted to the jury under instructions not excepted to.

The jury returned a verdict for the plaintiff for the full amount claimed; and the defendant alleged exceptions.

J. Brown, for the defendant. 1. An inspection of all the evidence in this case discloses no attempt to prove the contents of the note. The plaintiff says she received a note; a memorandum or acknowledgment would be a note. The declaration is upon a promissory note. The evidence does not disclose a promise to pay as part of the contents of the lost note. The evidence is too general, and would apply to any other note as well as the one described in the declaration. For aught that appears it might have been a six years' note and not yet due. The action was brought in 1874. It was a stale claim at best. She had not seen the note since the time she received it. She had received $2000 since, but she says that was on another note. No man's legal rights are safe, if the court upon such a state of facts refuses to instruct the jury that the evidence is too vague, uncertain, unsatisfactory and wholly insufficient to warrant a verdict for the plaintiff. It not appearing by the evidence what the contents of the note were, it would be impossible to properly describe it in the bond of indemnity offered. The note declared on would not describe it, because there is no proof that such a note was given in

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substance or effect, and it appears other notes had been given by the defendant. To permit the plaintiff to recover on such proof, would open a wide door to fraud. *Tower* v. *Appleton Bank*, 3 Allen, 387, 392.

2. Under the declaration, Annie F. Newell, to whom it had been indorsed and to whom all the plaintiff's right, title and interest in the note had been assigned, was the proper plaintiff, the note declared on being negotiable.

E. H. Bennett & H. J. Fuller, for the plaintiff, were not called upon.

GRAY, C J. The note declared on was dated July 1, 1869, for $1000 payable on demand. The evidence at the trial was that the plaintiff lent the defendant $1000 in July, in 1868 or 1869, and at the same time received from him a note, which, there being no evidence when it was payable, might be presumed to be payable on demand; and that this note had been lost and could not be produced. This evidence was sufficient, in the absence of evidence that any other note of this amount was ever given by the defendant to the plaintiff, to identify the note in suit, and to warrant the jury in returning a verdict for the plaintiff, and the court in rendering judgment in her favor upon her filing a sufficient bond of indemnity. *Clark* v. *Houghton*, 12 Gray, 38. *Goddard* v. *Sawyer*, 9 Allen, 78. *Nichols* v. *Allen*, 112 Mass. 23. *Tower* v. *Appleton Bank*, 3 Allen, 387. *McGregory* v. *McGregory*, 107 Mass. 543.

The assignment of all the payee's right in the note, without any indorsement, did not prevent the maintenance of an action upon the note in the name of the payee. *Foss* v. *Nutting*, 14 Gray, 484. *Cock* v. *Fellows*, 1 Johns. 143. *Smalley* v. *Wight*, 44 Maine, 442.

Exceptions overruled.

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JOHN HARRINGTON *vs.* FALL RIVER IRON WORKS COMPANY.

Bristol. October 26. — 28, 1875. WELLS & MORTON, JJ., absent.

A servant, who by his contract of hiring agrees that if he intends to leave his master's employ, he will give notice of such intention, and work ten full working days thereafter, and, in default thereof, forfeit all money that may be due him, may recover from the master wages previously earned, if he is kept from his work by sickness, gives reasonable notice thereof to the master, and is absent only so long as he is so disabled.

CONTRACT on an account annexed, for services in the defendant's mill during fifteen days in the month of May, 1873. Trial in the Superior Court, before *Wilkinson*, J., who allowed a bill of exceptions in substance as follows:

No question was made at the trial as to the amount due, if the plaintiff was entitled to recover. It appeared that the plaintiff on entering the employ of the defendant signed an agreement, a copy of which is printed in the margin; * that, after working for the defendant a short time, that part of the works in which he was laboring suspended operations, and he ceased to work for the defendant and was paid in full. The evidence was conflicting as to whether he was discharged or not, the plaintiff contending that he was, and the defendant contending that he was told he might return when that portion of the works started up, and that he did in fact in about eight weeks afterwards return and was set to work in another part of the establishment. After his return as aforesaid, which was in January, 1873, the plaintiff continued to work as the defendant intended under the contract aforesaid until May 19, 1873; at the close of his work on that day he left as usual, and did not return till the following Monday. The superintendent, after waiting two or three days, and, as he testified, hearing nothing from him, hired another man in his place, and told the plaintiff, when he came to him on the Monday aforesaid, that he had nothing for him to do. The plaintiff testified that he was compelled to stay away by sickness, and

* "I, the undersigned, employee of the F. R. I. Works Co., agree that in case I intend to leave their employment I will give notice of such intention, and work ten full working days; in default of which I agree to forfeit all money which may be due me."

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there was no evidence to the contrary, and that he sent word to the superintendent of that fact; the evidence was conflicting as to whether he did or did not send word.

The judge, among other instructions not objected to, instructed the jury that if the plaintiff was prevented from working by sickness, and gave notice to the defendant of the fact in a reasonable time, and returned to his work as soon as he was able, that would not be such a leaving of the defendant's employ as to require the working of the notice, and that he would be entitled to recover. The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

J. M. Morton, Jr., for the defendant.

H. K. Braley, for the plaintiff, was not called upon.

GRAY, C. J. If, as the jury have found under the instructions of the court, the plaintiff was kept from his work by sickness, and gave reasonable notice thereof to the defendant, and was absent only so long as he was so disabled, his absence was not wilful or intentional, and did not forfeit his right to his wages, either under the contract of the parties, or by the general rules of law. *Naylor* v. *Fall River Iron Works*, 118 Mass. 317. *Noon* v. *Salisbury Mills*, 3 Allen, 340. *Fuller* v. *Brown*, 11 Met. 440. *Caden* v. *Farwell*, 98 Mass. 137. *Exceptions overruled.*

EDWARD GALLIGAN *vs.* CHARLES A. CLARK.

Bristol. October 27. — 28, 1875. WELLS & MORTON, JJ., absent.

The provision of the Gen. Sts. c. 156, § 27, that in the taxation of costs "the plaintiff shall be allowed only one term fee if the defendant is defaulted without having appeared," does not apply when the defendant is defaulted on the main issue, and avails himself of the right reserved to him by the Gen. Sts. c. 133, §§ 2, 3, of being heard upon the assessment of damages, and of moving that such assessment be made by a jury.

APPEAL by the defendant from the taxation of costs by the clerk of the Superior Court, in an action of tort.

The case was submitted to the Superior Court, and to this court, on appeal, upon an agreed statement of facts in substance as follows:

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The action was entered in the Superior Court at September term 1873. The defendant did not appear and was defaulted at that term, and the case was continued for assessment of damages. The default has never been taken off.

At December term 1873, the defendant's counsel asked the consent of the plaintiff's counsel to the taking off of the default and to their appearance for the defendant in the suit, which was refused. They then said they should be heard upon the assessment of damages. The case was continued from term to term until March term 1875, and no entry of any kind for the defendant was made upon the docket until that term, when the clerk made the entry of "Dean & Reed, upon question of damages."

The case was set down for a hearing by the court at that term, and upon the day it was in order the defendant's counsel filed a motion in writing, asking that the damages might be assessed by a jury, which was granted upon the terms that the defendant first pay the plaintiff his costs in preparing for a hearing that day.

Subsequently at the same term the damages were assessed by a jury, the defendant asking for and having a view.

The clerk taxed the plaintiff's costs for each term, including those of March term 1875. The Superior Court affirmed the taxation.

J. H. Dean, for the defendant.

G. E. Williams, for the plaintiff.

GRAY, C. J. The provision of the Gen. Sts. *c.* 156, § 27, that in the taxation of costs "the plaintiff shall be allowed only one term fee if the defendant is defaulted without having appeared," relates to the time when costs are taxed; and a defendant, in order to come within it, must at that time stand defaulted and not have appeared to defend himself against the plaintiff's claim. To construe it with literal and grammatical strictness would deprive the plaintiff of costs after the first term, where the defendant, having once failed to appear, had been defaulted, although he had since had the default taken off, and taken part in the trial of the whole case. It would be equally inconsistent with the object of the statute, which is to prevent the plaintiff from accumulating costs by keeping an undefended case in court, to apply it to the case of a defendant who, although defaulted on the main

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issue, has availed himself of the right, reserved to him by the Gen. Sts. *c.* 133, §§ 2, 3, of being heard upon the assessment of damages, and of moving that such assessment be made by a jury.

Taxation affirmed.

THOMAS HILL *vs.* INHABITANTS OF SEEKONK. ELIZABETH HILL *vs.* SAME.

Bristol. October 28.—29, 1875. WELLS & MORTON, JJ., absent.

In an action against a town to recover for injuries caused by a defective highway, which the town was bound to keep in repair, one of the plaintiffs, who were riding together in their carriage in the daytime, testified that the defect was a hole in the way, caused by the dropping down of the capstone of a culvert, that the other plaintiff was driving, and that he was not at the time looking ahead, but was looking as any other person would who was driving in a carriage. The plaintiff who was driving testified that she had no previous knowledge of the defect, that the horse was gentle and was walking at the time, and that she was then looking straight ahead. The evidence also showed that the road was rough, that there was mud and water upon it, and that there was room to pass safely upon the side of the way. One witness for the plaintiff testified that any one who was on the lookout could have seen the hole. The presiding judge, at the defendant's request, instructed the jury in substance, that if the plaintiffs in the daytime, and at a walk upon a broad and substantially level road, with ample width for passing by the hole, went into it, when it was conspicuous, obvious and in plain sight, they were not in the exercise of due care, unless they show some excuse for their inattention to their track; and that the law requires of one riding in the daytime such attention to the road over which he is about to pass, as to see large holes that are conspicuous, obvious and in plain sight, unless some sufficient reason excuses the inattention, and refused to give the further instructions requested by the defendant, that no such excuse was offered or shown by the evidence in this case, and that there was no evidence in the case of due care on the part of the plaintiffs, or either of them. The judge, at the request of the plaintiffs, also instructed the jury that it was enough if the plaintiffs looked ahead in such a manner as persons of ordinary prudence usually do in riding upon a highway. The jury found for the plaintiffs. *Held*, that the last instruction was correct, that the other instructions were sufficiently favorable to the defendant, and that the case was rightly submitted to the jury.

ACTIONS OF TORT to recover for injuries occasioned by a defect in a highway, which the defendant was bound to keep in repair. The cases were tried together in the Superior Court, before *Wilkinson*, J., who, after a verdict in each case for the plaintiff, allowed a bill of exceptions in substance as follows:

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The plaintiffs were riding on the highway in an open wagon, with the horse at a walk, on Fast Day, April 3, 1873, and the accident occurred at about 5 o'clock in the afternoon.

Thomas Hill, one of the plaintiffs, testified that they were driving along, his daughter, the other plaintiff, having the reins; the horse was on the horse path and the wheels in the ruts; that the road at that time was rough, owing to the season; that there was mud and water in the road; that he had not seen the hole before; that he passed the place in the morning going to Providence, but was then leading his horse on the other side of the roadway, there being two carriage tracks, so that the horse was between him and this hole; that at the time of the injury the wagon went into the hole and brought up suddenly, because at the end it was abrupt, caused by the dropping down of the capstone of the culvert bridge; that he was then thrown out of the wagon by the striking of the wheel against the fallen capstone; that before that he had been looking the same as any other man riding in a carriage; that he was not looking to see a hole, and did not expect there was one there, and did not see it; that he was looking the same as any other man riding in a wagon; that his daughter, who was about twenty-four years old, had been accustomed to drive for many years.

Cross-examined. "The road was wide enough to go by safely, can't swear that I was looking at the road immediately before me; I saw the hole after I was thrown out; didn't see it before because I wasn't looking at the road immediately before me; I can't say that I was looking right ahead just then; I was not exactly looking to see if the wheel was going into that place."

Elizabeth Hill, the other plaintiff, testified that she was accustomed to drive, and had been for years; that she was driving at the time; that the horse was a gentle one and was walking; that she had no previous knowledge of the defect in the road; that the wagon wheel went into the hole, and brought up abruptly where the capstone of the culvert had fallen in, and she was thrown against the horse, injuring her; that at the time she was driving along looking straight ahead with her eyes open, and the first she knew they were thrown out by the wagon getting into the hole; that the road was rough, and there was mud

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and water on the road; that she did not see the hole before they went into it.

Cross-examined. "Father said nothing to me about the hole, nor I to him before the accident. I didn't see the hole because I was not looking. I was not looking in the ruts to see where the wheels were going. The wagon did not leave the ruts. We were looking ahead all the time, and not over the side, and not in the ruts."

Henry H. Goff, for the plaintiffs, testified that there were deep ruts all along there full of mud and water; that he saw this hole in the road when he went out to help the plaintiffs; that the stone had caved in, and that it was eighteen inches deep from the top of the capstone. It was two or three feet from the top of the road to the bottom of the hole.

Ezekiel C. Cushing, for the plaintiffs, testified that he was riding on the road in the morning before the accident, and saw the hole because he rode into it; that the hole was at the place where the capstone fell down, and that where the capstone had fallen it was eighteen or more inches deep; that after the accident he filled the hole, and it took a one half ox cart load of stones, and two thirds of a load of dirt on that to fill it; that the wagon must have gone into the hole gradually and brought up suddenly, where the stone had fallen in; that he dug away the earth and found the wall of the culvert had fallen down and the capstone had fallen in. The hole was four or five feet long and eighteen inches to two feet wide, and twenty-four inches deep. Any one could pass this hole that could drive. The road was broad and substantially level, and of ample width for two carriages to pass. There were no obstacles to the freest vision.

Leroy T. Bennett, for the plaintiffs, testified that he examined the place after the accident, and the cavity was from four to five feet long, fifteen inches wide, and he judged it eighteen or twenty inches deep; that he drove through it the Monday before.

David Allen, for the plaintiffs, testified that he saw the hole a few days before, and judged it to be about six feet long and eighteen or twenty inches wide; that he drove into it and was nearly capsized in the forenoon; and on his return avoided it.

James N. Goff, for the plaintiffs, testified: "Any man could have seen the hole if he had been upon the lookout. I saw it

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an hour or two before the accident." *Cross-examined.* "Any man could see it if he was n't a fool."

James E. Goff, for the plaintiffs, testified: "There was room enough to go by safely on the south side of the hole."

John C. Marvel, for the plaintiffs, testified: "I went by there the day before; remember it was a very bad hole; I turned out for it; say four feet long, and eighteen or twenty inches deep, with no water. I turned out and went right by."

Charles E. Jenks, for the plaintiffs, testified: "I went by in the afternoon of the day of the accident; saw the hole at the culvert; say eighteen inches wide, and eight inches deep. I saw it and turned out. It was no trouble to turn out and avoid the defect."

John Thacher, for the plaintiffs, testified: "There was some water in the ruts but it had nearly settled. The hole was thirty inches deep. I measured it with a stick to the bottom of the culvert. I was walking on the road at the time."

The above was all the evidence in the case affecting these exceptions.

The defendant requested the judge to give the following instructions to the jury, the first two of which were given as requested, and the last two refused:

"1. That if the plaintiffs, in the sunlight, and at a walk, upon a broad and substantially level road, with ample width for passing by the hole, went into a hole in a culvert bridge, which hole was three or four feet long, and two feet wide, and eighteen to twenty-four inches deep, conspicuous and obvious and in plain sight, they were not in the exercise of due care, or that care required of people driving on a road, unless they show some excuse for their inattention to their track.

"2. That the law requires of one riding in the daytime such attention to the road over which he is about to pass, as to see large holes that are conspicuous and obvious and in plain sight, unless some good and sufficient reason excuses the inattention.

"3. That no such excuse is offered in this case or shown by any evidence.

"4. That there is no evidence in this case of due care on the part of the plaintiffs or either of them."

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At the conclusion of the charge the plaintiffs requested the following instruction to the jury, which was given against the defendant's objection: "It is enough if he looks ahead in such a manner as persons of ordinary prudence usually do in riding upon a highway."

The case was submitted to the jury under instructions upon the duty of the plaintiffs to exercise due care, which were not excepted to otherwise than as above. The jury returned a verdict for the plaintiffs; and the defendant alleged exceptions.

T. M. Stetson, for the defendant.

W. H. Cobb, for the plaintiffs, was not called upon.

By the Court. The instruction that it was enough if the plaintiff looked ahead in such a manner as persons of ordinary prudence do in riding upon a highway was correct. The other instructions were, to say the least, sufficiently favorable to the defendant. The case was rightly submitted to the jury.

Exceptions overruled.

Mary E. Wales *vs.* Atherton Wales.

Bristol. October 28. — 29, 1875. Wells & Morton, JJ., absent.

The St. of 1873, c. 371, § 2, modifying the remedy given by the St. of 1870, c. 404, in proceedings for divorce for the cause of desertion, in cases where no judicial decree had been rendered, is within the constitutional power of the Legislature.

Under the St. of 1870, c. 404, providing for a decree *nisi* from the bonds of matrimony, for certain specified causes, including utter desertion, to be followed by an absolute decree in case the parties live separately for five years, a decree of divorce *nisi* was rendered at November term 1873 of this court upon a libel filed in May 1873, upon the default of the respondent after notice, for the cause of utter desertion from August 1872 to the date of the libel. The St. of 1873, c. 371, which took effect June 11, 1873, repealed the provision of the St. of 1870 authorizing the court to grant a divorce *nisi*, and provided that "no divorce shall be granted for desertion unless the desertion has continued for at least three consecutive years next prior to the filing of the libel for divorce." *Held*, upon a petition to set aside the decree, that the decree was unauthorized by law, and should be vacated.

Petition to set aside a decree of divorce *nisi* from the bond of matrimony, rendered by a justice of this court at November term 1873, upon the default of this petitioner, after notice to her, on

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a libel filed against her by the respondent on May 17, 1873, for the cause of utter desertion on August 15, 1872, and continued to the date of that libel.

The present petition alleged that by the St. of 1873, *c.* 371, which took effect June 11, 1873, it was not competent for the court to enter any decree whatever upon the libel. At the hearing before *Gray*, C. J., the allegations of the petition were proved, and it was ruled that the prayer thereof should be granted; and, at the request of the respondent, the question of the correctness of this ruling was reserved for the consideration of the full court, according to whose opinion a decree was to be entered accordingly, or the petition dismissed.

J. Daggett, for the respondent.

E. Ames, for the petitioner, was not called upon.

GRAY, C. J. The original libel was filed under the St. of 1870, *c.* 404, for utter desertion, which, not having continued for five years, was not a cause for a divorce from the bond of matrimony under the Gen. Sts. *c.* 107, § 7.

Under the St. of 1870, the court could not decree a divorce from the bond of matrimony for the cause alleged, but only a divorce *nisi*, which was in the nature of a divorce from bed and board, did not dissolve the marriage, and could not be made absolute except upon a new petition filed not less than three years from the time of the first decree. St. 1870, *c.* 404, §§ 2, 3. *Graves* v. *Graves*, 108 Mass. 314. *Edgerly* v. *Edgerly*, 112 Mass. 53.

The St. of 1873, *c.* 371, § 2, repealed the provision of the St. of 1870 authorizing the court to grant a divorce *nisi*, but authorized a divorce from the bond of matrimony to be granted for the cause of desertion continued for three consecutive years before the filing of the libel for such divorce. As applied to cases of desertion, this statute merely changed and simplified the form of remedy, by substituting, for the double proceeding of a libel for a divorce *nisi*, and a petition to make it absolute at the expiration of not less than three years afterwards, as allowed by the St. of 1870, a single proceeding by a libel for an absolute divorce after the desertion had continued for three years. Such a modification of the remedy, in cases in which no judicial decree had been rendered, was clearly within the constitutional power of the Legisla-

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ture, and not open to the objections upon which the St. of 1874, c. 397, § 1, was declared void in *Sparhawk* v. *Sparhawk*, 116 Mass. 315.

It follows that the decree of divorce *nisi*, granted in this case since the St. of 1873 took effect, was by inadvertence, without authority, and of no legal effect, and should therefore be set aside and vacated. *Edson* v. *Edson*, 108 Mass. 590. *Ex parte Crenshaw*, 15 Pet. 119. *Collins* v. *Taylor*, 3 Green Ch. 163.

Petition granted.

WILLIAM WALLACE *vs.* TAUNTON STREET RAILWAY COMPANY.

Bristol. October 29, 1875. WELLS & MORTON, JJ., absent.

In an action against a street railway corporation for injuries caused by the act of one of its conductors in wrongfully expelling a passenger from a car, the plaintiff introduced evidence that his knee was injured while he was so expelled; that in consequence he was confined to his house from four to six months, and was afterwards obliged to walk with crutches. The defendant introduced evidence, in reply, that the plaintiff was seen walking in his dooryard, and the streets, with little apparent lameness and without crutches, within two or three days after the alleged injuries were received, and from time to time within the period named by the plaintiff. The plaintiff, at the close of the defendant's evidence, offered evidence that during that period the witnesses had seen him in his house with his foot upon a pillow, and had helped him from his chair to his bed. It did not appear that this evidence related to the days and times testified to by the defendant's witnesses. *Held*, that this evidence was part of the plaintiff's case, and that it was within the discretion of the judge at the trial to exclude it when offered in rebuttal.

The extent to which a witness may be cross-examined to prove bias rests largely in the discretion of the judge presiding at the trial; and where, in an action against a corporation, it appears that its president and treasurer are members of another corporation having persons in its employ, and the plaintiff's counsel, in cross-examining a witness for the defendant, asks him if he is not an employee of the latter corporation, for the purpose of showing bias, no exception lies to the exclusion of the evidence.

TORT for injuries caused by the act of a conductor of the defendant corporation in expelling the plaintiff from one of its cars, in which he was a passenger. At the trial in the Superior Court, before *Aldrich*, J., the plaintiff introduced evidence tending to show that he was wrongfully expelled from the car by the con-

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ductor; that his knee was wrenched and seriously sprained while being so expelled; that he was thereby made very lame, and for some time was unable to walk, and was confined to his house four months or six months before he was able to walk out doors; and that at that time he was still lame and walked with crutches. To establish these facts as to the plaintiff's condition, and to show the extent of his injuries and his incapacity to walk, the plaintiff testified on his own behalf, and called his physician and several other witnesses.

The defendant contended, and introduced evidence tending to show, that the plaintiff was rightfully ejected from the car on account of his improper and disorderly conduct; and in reply to, and in contradiction of, the plaintiff's evidence as to the length of time he was confined to his house and the extent of his injuries, called several witnesses who testified that, within two or three days after the alleged injuries were received, they saw the plaintiff walking in his dooryard, and in the public streets, and that they so observed him walking from time to time during the period of four or six months covered by the plaintiff's evidence, and that at those times he walked with little apparent lameness and without crutches. To contradict and control this evidence of the defence, the plaintiff offered to call several witnesses who would testify that they had seen him from time to time during the four months he said he had been confined to his house, and that they had seen him sitting in his house with his foot resting upon a pillow in a chair, and that they had helped him from his chair to his bed. This evidence was objected to at this stage of the trial, after the close of the defendant's evidence, on the ground that it should have been introduced, if at all, as a part of the plaintiff's evidence in chief, and that it was not competent and had no legitimate tendency to contradict the evidence of the defence. There was no offer to show by these witnesses, whom the plaintiff proposed to call, that they had seen or that they knew the plaintiff was in his house, or elsewhere than the defendant's witnesses swore they had seen him, on the days and times referred to in their testimony. The offered testimony was excluded, and the plaintiff excepted. The plaintiff was allowed, in rebuttal of the defendant's evidence, to testify that he was not out of his house, or in his yard, or on the public streets, on any of the times and

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days sworn to by the defendant's witnesses; and full opportunity was given to the plaintiff to call any witness who would say he had seen the plaintiff in his house on any of the days and times aforesaid.

It appeared in evidence that William C. Lovering was president, and Henry M. Lovering was treasurer of the defendant corporation; and it also appeared that they were members of the Whittenton Mills, a manufacturing company doing business in Taunton, and having persons in its employment. In the cross-examination of one of the defendant's witnesses, the plaintiff's counsel asked him if he was not an employee of said Whittenton Mills, for the purpose of showing that he was biased or prejudiced in favor of the defendant corporation; the question was objected to and excluded, as incompetent for the purpose for which it was put, and the plaintiff excepted.

Full instructions, not objected to, were given in regard to all the issues raised by the pleadings and upon every part of the case.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions to the exclusion of the evidence offered by him.

J. Brown, for the plaintiff.

T. M. Stetson & G. E. Williams, for the defendant, were not called upon.

By the Court. The evidence, offered by the plaintiff in reply, which was excluded by the presiding judge, related to the degree of the plaintiff's injury, and was part of his case, and did not directly contradict any of the testimony introduced by the defendant. It was therefore admissible, at this stage, only in the discretion of the judge, and no exception can be sustained to its exclusion.

The extent to which a witness may be cross-examined to prove bias rests largely in the discretion of the judge presiding at the trial, and the bill of exceptions does not show that such discretion was illegally exercised in this case. It does not even appear that the witness knew that the officers of the defendant corporation were stockholders in the manufacturing company by which he was employed. *Exceptions overruled.*

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HENRY C. HAWKINS & another *vs.* CITY OF FALL RIVER.

Bristol. October 29, 1875. WELLS & MORTON, JJ., absent.

Upon the assessment of damages sustained by the taking of land for a highway, a witness who has testified without objection to the value of the land taken, may state the reasons of his opinion.

PETITION to the county commissioners for a jury to assess damages for the taking of land by the respondent to widen Pleasant Street, in Fall River.

At the trial before a sheriff's jury the respondent called one Franklin L. Almy as an expert, to testify to the value of the land taken by the city, and he was permitted to testify thereto without objection, having known of sales of land at or about the time of the taking. The respondent then asked him the following question: "How did you get at your opinion of the market value?" The petitioners objected, and the sheriff excluded the question; and the respondent excepted. The jury returned a verdict for the petitioners, which was certified to the Superior Court. In that court the verdict was set aside on motion of the respondent, and the petitioners appealed to this court.

J. C. Blaisdell, for the petitioners.

J. M. Morton, Jr. & M. Reed, for the respondent, were not called upon.

BY THE COURT. The refusal of the sheriff to permit the witness Almy to state the reasons of his opinion was erroneous. The point has been repeatedly decided, both as to witnesses testifying to value, and as to experts strictly so called. *Commonwealth* v. *Webster*, 5 Cush. 295. *Keith* v. *Lothrop*, 10 Cush. 453. *Dickenson* v. *Fitchburg*, 13 Gray, 546. *Lincoln* v. *Taunton Copper Co.* 9 Allen, 181. *Sexton* v. *North Bridgewater*, 116 Mass. 200. *Demerritt* v. *Randall*, 116 Mass. 331.

Judgment setting aside the verdict affirmed.

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FIRST BAPTIST SOCIETY *vs.* CITY OF FALL RIVER.

Bristol. October 29, 1875. WELLS & MORTON, JJ., absent.

Land was taken for the alteration of a highway by the mayor and aldermen of a city, who awarded the petitioner $2000 as damages. The owner being dissatisfied with the award applied for a jury, who at the trial were directed to add interest from the time of the taking of the land upon the amount of damages found by them to have been thereby occasioned to the petitioner's estate, and to return the amount of damages and interest in one sum. The jury returned a verdict, that "they estimate and assess the amount of damages sustained by the petitioner at the sum of $2166.75." *Held*, that the jury must be presumed to have followed the direction to them, and that the damages awarded by the mayor and aldermen were not increased so as to entitle the petitioner to costs under the Gen. Sts. *c.* 43, § 73.

PETITION under the Gen. Sts. *c.* 43, for a jury to assess the damages occasioned by the widening of Columbia Street, in Fall River, over land of the petitioner. The case was submitted to the Superior Court, and to this court on appeal, on an agreed statement of facts, in substance as follows:

The land was taken on August 19, 1873, by the mayor and aldermen of Fall River, who awarded the petitioner $2000 as damages. The petitioner being dissatisfied with the award applied for a sheriff's jury to assess the damages. On June 11, 1875, the case was tried before a sheriff's jury, who rendered a verdict: that "they estimate and assess the amount of damages sustained by the said petitioner at the sum of two thousand one hundred and sixty-six dollars and seventy-five cents."

The jury were instructed by the sheriff, first to consider the value of the land taken; second, to consider the damage to the remaining property by the taking of the land; then, to consider the benefits, if any, to the petitioner, direct or special, not shared in common with others abutting on said street, and if any such benefits are found, deduct the same from the amount of damages agreed upon, and to the remaining amount add interest at six per cent. per annum, from August 19, 1873, to June 11, 1875, putting the amount of damage and interest in one sum.

The verdict was duly returned to June term 1875, of the Superior Court. At the next term the petitioner moved that the verdict be accepted and recorded, and judgment be entered thereon; and that the petitioner be allowed the charges and costs arising on the application, which were taxed at $177.07.

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The respondent objected to the allowance of the charges and costs; the clerk disallowed them; his taxation was affirmed by the court; and the petitioner appealed.

J. C. Blaisdell, for the petitioner. 1. The agreed statement of facts establishes conclusively that the city awarded the petitioner as damages the sum of $2000, and that the jury assessed the amount of damages at the sum of $2166.75, as damages.

2. Although the jury were instructed in the manner stated, yet their verdict finds, not damages and interest to be $2166.75, but damages alone to be that amount. The court will not go behind the verdict, as that is a conclusion of fact found by the jury. *Kidder* v. *Oxford*, 116 Mass. 165. The petitioner is therefore the prevailing party, and is entitled to its costs. Gen. Sts. *c.* 43, § 73; *c.* 156, § 1.

M. Reed, for the respondent, was not called upon.

By the Court. The jury were directed by the sheriff to add interest, from the time of the taking of the land, upon the amount of damages found by them to have been thereby occasioned to the petitioner's estate, and to return the amount of damages and interest in one sum; and they must be presumed to have followed that direction. It thus appears that their verdict included interest, and that, making due allowance for the interest so included, the damages awarded by the mayor and aldermen were not increased by the jury. The petitioner is therefore not entitled to costs. Gen. St. *c.* 43, § 73. *Kidder* v. *Oxford*, 116 Mass. 165.

Taxation affirmed.

John Hogan *vs.* Thomas Coleman.

Bristol. October 29, 1875. Wells & Morton, JJ., absent.

In an action for work and materials furnished by the plaintiff to the defendant, the judge who tried the case without a jury found as matters of fact that the plaintiff did not prove the contract declared on; and that, there being conflicting evidence upon the question whether the defendant promised to see him paid for work and materials which he originally agreed to furnish to another person, the liability of the original debtor was not extinguished, and ordered judgment for the defendant. *Held*, the findings of fact not being subject to revision in this court, that the judge rightly ruled as matter of law that such promise would not support the declaration.

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CONTRACT. The declaration alleged that the plaintiff made a verbal agreement with the defendant to dig and wall his cellar, furnish the materials for the mason work, and to do the labor in putting up and putting on said materials in mason work for a six tenement block, belonging to the defendant, in Fall River, for the sum of $1425; that in pursuance of said verbal agreement he furnished the materials, dug and walled the cellar, and put up and put on the materials in mason work to the said six tenement block for the defendant for the said sum; that the defendant, in consideration thereof, paid him on or about August 13, 1873, the sum of $725 towards the same, and that the defendant owes the plaintiff the balance of $700, and interest on the same from October 15, 1873, according to an account annexed.

The answer of defendant contained a general denial, alleged payment and denied any agreement to pay interest.

At the trial in the Superior Court without a jury, *Pitman*, J., ordered judgment for the defendant, subject to the plaintiff's exceptions upon the following findings and rulings:

"I find that the plaintiff has not established by a preponderance of proof the contract or agreement set forth in his declaration. There is also evidence tending to show that after an original undertaking had been entered into between the plaintiff and one Francis Hye to furnish on his account the work and materials for which this suit is now brought, that said plaintiff declined or refused to furnish the same, and that the defendant thereupon promised to see him paid. The defendant offered evidence to the contrary.

"As upon my view of the whole evidence there does not appear to me, if this were proved, to have been a novation or an extinguishment of the original liability of Hye, I have not deemed it material to determine whether or not there was such a collateral undertaking, because if proved it would not be the contract declared on. Upon the pleadings I therefore find for the defendant."

L. Lapham, for the plaintiff.

W. E. Fuller, for the defendant, was not called upon.

BY THE COURT. The declaration is for work and materials furnished by the plaintiff to the defendant. The judge below has found as matters of fact (which are not subject to revision)

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that the plaintiff did not prove the contract declared on, and that, if the defendant promised to see him paid for work and materials which he originally agreed to furnish to another person, the liability of the original debtor was not extinguished; and rightly ruled as matter of law, that such a promise would not support the declaration. *Exceptions overruled.*

THOMAS BRADY *vs.* AMERICAN PRINT WORKS.

Bristol. October 29, 1875. WELLS & MORTON, JJ., absent.

Under the Gen. Sts. *c.* 43, § 40, authorizing the Superior Court to set aside the verdict of a sheriff's jury for "good cause," the question whether, upon the proof of the irregular and improper conduct of the officer having the jury in charge, the verdict should be set aside or accepted by the Superior Court, is within the discretion of the presiding judge, and to the exercise of that discretion no exception lies.

COMPLAINT under the mill act, Gen. Sts. *c.* 149. Trial before a sheriff's jury, who returned a verdict for the petitioner, which verdict was certified to the Superior Court. In that court, the respondent moved to set aside the verdict, "because the deputy in charge of said jury entered the room where they were deliberating before they had agreed and sealed up their verdict." *Wilkinson*, J., allowed a bill of exceptions in substance as follows:

It appeared that the deputy sheriff, who was left in charge of the jury, went into the room where they were, and while they were deliberating upon their verdict; that the room occupied by them was a large one, and that the officer stepped in for the purpose of warming himself, and sat a few minutes by a stove in the room; that he left the room before they had agreed upon a verdict, and had no conversation with any of said jurors while he was in the room; that as he was entering the room, the foreman asked him if the sheriff had gone, and he answered yes; that the foreman asked him "Who is going to give us instruction if we want any?" and he made no answer to this question.

The court thereupon ordered the verdict to be set aside, and the petitioner alleged exceptions.

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E. H. Bennett & H. J. Fuller, for the petitioner. The acts of the deputy do not constitute any "good cause" for setting the verdict aside. There was no officious intermeddling by him, nor was the respondent in the least degree injured. *Leach* v. *Wilbur*, 9 Allen, 212. *Tripp* v. *County Commissioners*, 2 Allen, 556. *Commonwealth* v. *Roby*, 12 Pick. 496, 519.

J. M. Morton, Jr., for the respondent, was not called upon.

By the Court. The Superior Court is authorized by statute to set aside the verdict of a sheriff's jury for "good cause." Gen. Sts. *c.* 43, § 40; *c.* 149, §§ 13, 14. The question whether, upon the proof of the irregular and improper conduct of the officer, such an interference with the deliberations of the jury was to be inferred, as required the verdict to be set aside, was a question of fact, largely depending upon the credit given to witnesses, and addressed exclusively to the discretion of the presiding judge; and the exercise of that discretion, not appearing to have involved any ruling in matter of law, is not subject to revision, whether the verdict is set aside or accepted. *Norton* v. *Wilbur*, 5 Gray, 7. *Shea* v. *Lawrence*, 1 Allen, 167. *Tripp* v. *County Commissioners*, 2 Allen, 556. *Leach* v. *Wilbur*, 9 Allen, 212. *Stetson* v. *Medford*, 109 Mass. 242.

Judgment setting aside the verdict affirmed.

William F. Rose *vs.* City of Taunton.

Bristol. Oct. 26. — Nov. 3, 1875. Wells & Morton, JJ., absent.

The recital in a deed of land of the consideration paid is not admissible in evidence to show the value of adjoining land, as between persons not parties to the deed.

At the trial for the assessment of damages sustained by the taking of land for a highway, under the Gen. Sts. *c.* 43, the petitioner offered office copies of four deeds of land in the neighborhood to show the price paid for the lots of land described therein. Objection was made to the admission of all the deeds, but special grounds of objection were assigned to the admission of three of them only. All the deeds were admitted in evidence. *Held*, that all the deeds were duly objected to at the trial as incompetent evidence of the price or value of the land, and that the respondent was entitled to insist upon this objection as a ground for setting aside the verdict.

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An order of the Superior Court, setting aside the verdict of a sheriff's jury, is a final disposition of the case so far as that court is concerned, and any question of law involved in the order may be brought at once to this court by exceptions or appeal.

PETITION to the county commissioners for a jury to assess damages for the taking of land by the respondent to lay out a highway in the city of Taunton.

At the trial before a sheriff's jury, the petitioner offered office copies of four deeds of land, one from Thomas Leach to Helen E. Felch, one from Helen E. Felch to Thomas Leach, one from Abram R. Pontin to Lewis H. Goward, and one from Joseph H. Rines to David Johnson, to show the price paid for these lots of land, therein described, and for any other purpose for which they were competent. Objection was made to the admission of all these deeds, the objection being to the Leach and Felch deeds that they were of land not similar in character to the petitioner's; and to the deed from Rines to Johnson, because the land was from eight hundred to one thousand feet distant, and that much farther from the thickly settled part of the city. But it appeared to the sheriff that all of these tracts of land were of a similar character to the petitioner's, and that it might give the jury some light respecting the price of the petitioner's land, and they were admitted. The jury returned a verdict for the petitioner.

In the Superior Court the verdict was set aside. The petitioner appealed to this court.

W. E. Fuller, for the petitioner.

G. E. Williams, for the respondent.

GRAY, C. J. The office copies of deeds were incompetent evidence for the purpose for which they were offered and admitted at the trial before the sheriff's jury. Even as against a party to a deed, the recital of the consideration paid is not conclusive, and is admissible as *primâ facie* evidence, only because one party has signed and the other has accepted the deed containing the recital. *Paige* v. *Sherman*, 6 Gray, 511. As between third persons, such recitals are no evidence whatever. *Spaulding* v. *Knight*, 116 Mass. 148, 155.

The sheriff's certificate shows that the copies of deeds were offered and admitted as evidence of the price paid for the land.

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that objection was made to the admission of all four of them, and that the special grounds of objection extended to three of them only. It is manifest therefore that all the deeds were objected to at the trial as incompetent evidence of the price or value of the land, and that the respondent was entitled to insist upon this objection as a ground for setting aside the verdict.

As several appeals have been entered at this term from orders of the Superior Court setting aside the verdict of a sheriff's jury, and have been entertained by this court without waiting for the result of another trial, it is proper to add, in order to prevent misunderstanding, that such an order does not stand upon the same ground as an order of the Superior Court granting a new trial in a suit pending in that court, which cannot be brought to this court for revision by appeal or exceptions until the case has been finally disposed of in the Superior Court.

Upon a proceeding to assess damages, begun by petition to the county commissioners, and tried upon a warrant from them before a sheriff's jury, nothing is ever returned to or entered in the Superior Court but the verdict of the jury and the certificate of the rulings at the trial, and the only action which the court can take in the matter is to pass an order accepting or setting aside the verdict, and to certify the result to the county commissioners. After such an order, either of acceptance or rejection, has been so made and certified, the case no longer remains in the Superior Court or upon its docket. If the verdict is accepted, no further judgment or execution follows in the Superior Court; but if the amount of the verdict is not paid, a warrant of distress is issued by the county commissioners. If the verdict is set aside by the Superior Court, a new application for a jury is presented to the county commissioners, and when the jury summoned thereon return a verdict, it is certified anew by the presiding officer to the Superior Court, and takes a place upon its docket as if no previous action in the court had been had. Gen. Sts. c. 43, §§ 33, 40, 42, 48; c. 133, § 8. *New Bedford* v. *County Commissioners*, 9 Gray, 346, 347.

An order of the Superior Court, either setting aside or accepting the verdict of a sheriff's jury, is therefore a final disposition of the case, so far as that court is concerned, and any question of law involved in the order may be brought at once to this court

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by exceptions or appeal. *Parker* v. *Framingham*, 8 Met. 260. *Walker* v. *Boston & Maine Railroad*, 3 Cush. 1. *Fitchburg Railroad* v. *Boston & Maine Railroad*, 3 Cush. 58. *Tucker* v. *Massachusetts Central Railroad*, 116 Mass. 124. *Hogan* v. *Ward*, 117 Mass. 67. *Judgment setting aside the verdict affirmed.*

LOUM SNOW & another, executors, *vs.* CATHERINE FOLEY & others.

Bristol. Oct. 28. — Nov. 3, 1875. WELLS & MORTON, JJ., absent.

A testator by his will bequeathed a certain sum of money to trustees, who were directed to pay the income accruing therefrom to his wife during her life. The will provided that the trust should terminate upon the death of the wife, when the trustees were directed to pay over to his wife's niece the sum of $3000; a certain sum to another legatee, and the residue of the trust fund to the residuary legatees. A codicil to the will provided: "To my wife's niece I give the sum of $7000 in addition to the $3000 given in my will, making $10,000; and I ratify and confirm my said will in all other particulars." *Held*, that the legacy given by the codicil must be paid from the trust fund upon the same conditions as the original legacy to the niece.

BILL IN EQUITY by the executors of the will and codicil of Thomas Sullivan, against the legatees named in the will, to obtain the instructions of the court. The testator by his will, which was dated September 5, 1873, after declaring that his lawful debts and funeral expenses should be paid, devised and bequeathed to his wife, Julia A. Sullivan, specific real estate and chattels, and gave $30,000 to trustees, who were directed to invest the same and pay to his wife the income accruing therefrom during her life. The will then provided as follows:

"After the decease of my said wife, Julia A. Sullivan, I direct that said trust shall end and determine, and from the capital of said trust fund, I give, bequeath and devise the following legacies, which I direct my said trustees then to pay over, to wit:

"1st. To my wife's niece, Ida A. Kanouse, I give the sum of three thousand dollars.

"2d. To Marion Flavan, the daughter of my sister Hannah Barrett, by her first husband, of Halifax, Nova Scotia, I give the sum of two thousand dollars.

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"3d. All the rest and residue of said trust fund shall fall into the residue and be disposed of as hereinafter provided."

"All the rest, residue and remainder of my property and estate of every description, I give, bequeath and devise unto my two sisters, Catherine Foley, wife of Robert Foley, and Hannah Barrett, wife of James Barrett, all of Halifax, Nova Scotia, to them and their heirs to be equally divided between them, and in case of the decease of either or both of my said sisters prior to my decease, then to her or their issue by right of representation."

The codicil to the will, dated November 10, 1873, provided as follows: "To my wife's niece, Ida A. Kanouse, I give the sum of seven thousand dollars in addition to the three thousand dollars given in my will, making $10,000; and I ratify and confirm my said will in all other particulars."

The bill alleged payment to the trustees named in the will of the trust fund of $30,000, and that there remained in the hands of the executors certain personal property not yet converted into cash, but amounting to $8065 at the inventory values, which, after deducting charges of administration, was applicable to the payment of the legacies given in the will and codicil; and that the said Ida A. Kanouse claims that, by the true meaning and construction of said will and codicil, her said legacy of $7000 given in said codicil is payable, so far as there are funds in the hands of said executors to pay the same, out of the residuum of said estate after the creation of said trust fund, and that the payment thereof is not deferred to the decease of the said Julia A. Sullivan, the widow of said deceased, and she has demanded payment of the same; but that the residuary legatees claim that said legacy of $7000 is payable out of said trust fund at the termination of said trust after the decease of said Julia; and they claim that the funds in the hands of said executors ought to be paid to them, and they have demanded the same.

The answers of the defendants admitted the averments of the bill.

C. W. Clifford, for the guardian of Ida A. Kanouse. All bequests given by a codicil are to be paid out of the residuum so far as it is sufficient, unless the bequest specifies some other mode of payment. 1 Jarman on Wills, (Perkins's ed.) 201, and cases

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cited. This is an absolute bequest, and falls within the above rule. It is not limited in terms. The absence of any limitation aids the construction. In the will, the mode of payment of the bequests is expressly stated. The words "in addition to" distinguish rather than assimilate the bequest of the codicil to the bequest of the will. The burden is upon the residuary legatees to show the qualification of the bequest. This is an additional not a substituted bequest.

G. Sennott, for the residuary legatees.

GRAY, C. J. The legacy, given by the codicil, of $7000 "in addition to" the $3000 given to the same person by the will, the codicil expressly ratifying and confirming the will in all other particulars, is to be paid out of the same fund and subject to the same conditions as the original legacy, and is therefore payable upon the death of the widow and out of the trust fund of which she has the income during her life. *Crowder* v. *Clowes*, 2 Ves. Jr. 449. *Day* v. *Croft*, 4 Beav. 561. *Warwick* v. *Hawkins*, 5 De G. & Sm. 481. *Russell* v. *Dickson*, 1 Con. & Laws. 284, 289; *S. C.* 2 Dru. & War. 133, 138. *Pike* v. *Walley*, 15 Gray, 845, 847. *Decree for residuary legatees.*

COMMONWEALTH *vs.* KATIE C. TWOMBLY.

Essex. November 3, 1875. WELLS, COLT & MORTON, JJ., absent.

At the trial of a complaint under the Gen. Sts. c. 87, §§ 6, 7, for keeping and maintaining, on May 1, 1875, and on divers other days between that day and September 27, 1875, a tenement for the illegal sale of intoxicating liquors, a witness for the government testified that a few days before the trial, which was at October term 1875, the defendant told him that a card which the witness produced and upon which were printed the defendant's name and address, and the words, "Dealer in imported wines and liquors," "Porter" and "Lager Beer," was her card, and that she had the card printed about a year before. *Held*, that the witness was rightly permitted to read the card for the purpose of showing that the defendant was keeper of the tenement on May 1, 1875.

COMPLAINT under the Gen. Sts. *c.* 87, §§ 6, 7, for keeping and maintaining on May 1, 1875, and on divers other days between that day and September 27, 1875, a certain tenement, in Glouces-

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ter, used for the illegal sale and illegal keeping of intoxicating liquors, said tenement being then and there a common nuisance.

At the trial in the Superior Court, at October term 1875, before *Pitman*, J., a witness for the government produced a printed card, containing the following words: "Katie C. Twombly. Dealer in Imported Wines and Liquors. Beach Street, Gloucester, Mass. Choice Cigars. Tobacco. Porter. Lager Beer." He then testified that, within a few days, he had a conversation with the defendant, who then told him that that was her card, and that she had the card printed about a year ago. The counsel for the government asked the witness to read the card for the purpose of showing that the defendant was keeper of the house on the first day of May last. The defendant objected to the reading of the card for that purpose, but the judge allowed the card to be read; and the defendant alleged exceptions.

C. A. Benjamin, for the defendant.

C. R. Train, Attorney General, for the Commonwealth, was not called upon.

By the Court. The testimony that the defendant, a few days before the trial, told the witness that the card was hers, and she had had it printed about a year before, without qualifying in any way the natural inference from that admission, made the card competent evidence against her that the facts stated thereon were true at an intermediate time.

Exceptions overruled.

Commonwealth *vs.* Henrietta Fields.

Essex. November 3, 1875. Wells, Colt & Morton, JJ., absent.

At the trial, on appeal from a Police Court, of a complaint for a sale of intoxicating liquor to a person unknown, if the evidence corresponds with the allegation of the complaint, the jury may, in the absence of proof to the contrary, presume the offence proved to be the same as that of which the defendant was convicted in the Police Court.

Complaint to the Police Court of Gloucester for an unlawful sale of intoxicating liquors at Gloucester, "to a man whose name is unknown to the complainant," on July 2, 1875. At the trial

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on appeal, in the Superior Court, before *Pitman*, J., there was only one witness for the government, and he testified that he went into a shop in Gloucester, in which there was a bar and bottles and other things usually found in a bar-room; that he saw four men standing at the bar, and the defendant standing behind it; that he heard the four persons severally call for intoxicating liquors, each designating the kind; that the defendant passed to each a tumbler with liquor which was drunk, that he saw one of them pay ten cents for his drink; that witness then went out; that whether the others did or did not pay he did not know; and that he was a witness before the Police Court in this case and testified to the same there. This being the whole evidence upon the question of sale, the defendant's counsel asked the judge to instruct the jury that as the evidence uncontradicted proved four distinct sales, and there was no evidence to show on which one the complaint was made, or on which the court below convicted, the defendant should be acquitted. But the judge declined to so instruct the jury and left it to them to decide, under general instructions not otherwise objected to than on the ground above stated, as a question of fact, for what the complaint was made and conviction had in the lower court. To which rulings and refusals to rule the defendant alleged exceptions.

C. A. Benjamin, for the defendant.

C. R. Train, Attorney General, for the Commonwealth, was not called upon.

By the Court. In the absence of proof to the contrary, the jury were authorized to find that the offence of which they found the defendant guilty was the same as that of which he had been convicted in the Police Court. *Commonwealth* v. *Burke*, 14 Gray, 81. *Commonwealth* v. *Carroll*, 15 Gray, 412. *Commonwealth* v. *Carr*, 111 Mass. 423. ***Exceptions overruled.***

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COMMONWEALTH *vs.* STEPHEN P. RANDALL.

Essex. Nov. 3. — 15, 1875. WELLS, COLT & MORTON, JJ., absent.

On the trial of an indictment for larceny of railroad tickets, the property of a railroad corporation, the government introduced evidence that five packages of tickets, containing one hundred each, belonging to the railroad corporation, and numbered in regular succession from 1 to 500, were placed in the hands of its ticket-agent; that soon after one of these packages, containing tickets numbered from 200 to 300, was found to be missing, and that two tickets identical in appearance and general description with those contained in the missing package, and numbered as they should have been if contained in that package, were found in the possession of the defendant. There was also evidence that the defendant said that he bought those tickets of the ticket-agent, who denied this. *Held*, that on this evidence the jury were warranted in returning a verdict of guilty.

INDICTMENT on the Gen. Sts. *c.* 161, § 18, charging that the defendant on November 12, 1874, at Rockport, in the County of Essex, "one hundred railroad tickets, of the value of one dollar each ticket, thirty other railroad tickets, of the value of seventy cents each ticket, of the goods and chattels of the Eastern Railroad Company, a corporation duly established by law in said Commonwealth, then and there in the possession of said corporation being found in the building of said corporation in said Rockport, then and there feloniously did steal, take and carry away, in the building aforesaid, against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided."

Trial in the Superior Court before *Wilkinson*, J., who allowed a bill of exceptions in substance as follows:

There was evidence on the part of the government tending to show that two Rockport and Gloucester tickets, numbered 276 and 283, were traced to the possession of the defendant.

Howard A. Saville, ticket agent of the Eastern Railroad Company at Rockport, testified as follows: "On September 29, 1874, I received from the Eastern Railroad Company, five packages of Rockport and Gloucester tickets, done up in a paper bundle. The tickets differed from any I had before received from the company. I opened the bundle, took out the packages, and looked to see if there were five packages. Each package was bound with a string, and the tickets were numbered as far as I saw. I looked at the number of the first and last tickets of each

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package. The numbers of the first and last tickets of the first package were 0 and 99, of the second package 100 and 199, of the third 200 and 299, of the fourth 300 and 399, and of the fifth 400 and 499. I commenced selling from the first package of tickets, and had sold seven tickets at the time the third package was missing. I afterwards sold to No. 114, and noticed no irregularity in the numbers. On October 5 one of the packages, of which the first ticket was marked 200 and the last 299, was missing. The only way I knew what tickets were in the package was by examining the first and last tickets. I did not look at the intermediate numbers in any package, excepting the first package."

There was evidence tending to prove that all the tickets in the bundle were of the same color and general description, excepting the numbers. There was also evidence that the defendant said that he bought the tickets marked 276 and 283 of Howard A. Saville, the ticket agent, who denied this. It was conceded on the part of the defence that if a package of tickets was taken, it was the property of the Eastern Railroad Company.

Upon this testimony the defendant requested the judge to rule that there was no evidence from which the jury could find that the tickets found in the possession of the defendant were the property of the Eastern Railroad Company, or that they were in the package alleged to have been stolen. The judge declined so to rule, and gave instructions upon this point to which no objection was taken, unless the ruling requested by the defendant should have been made.

The defendant was found guilty; and alleged exceptions to the refusal of the judge to rule as requested.

H. B. Moulton, (*J. T. Mahoney* with him,) for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

AMES, J. The evidence at least tended to show that five packages of tickets, containing one hundred each, belonging to the Eastern Railroad Company, and numbered in regular succession as far as No. 500, were placed in the hands of their agent Saville; that shortly afterwards one of these packages, containing tickets numbered from 200 to 300, was found to be missing; and that two tickets, identical in appearance and general description with those contained in the missing package, and numbered

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as they should have been if contained in that package, were found in the possession of the defendant. This evidence was supplemented by proof that the defendant said that he bought those two tickets of Saville, an explanation which Saville distinctly declared to be false. It might therefore have been presented to the jury as a case of recent possession of property, like in kind to that which had escaped from the hands of the true owner, and where no sufficient explanation was given by the defendant. We cannot doubt that upon such evidence a verdict of guilty might lawfully have been rendered.

Exceptions overruled.

COMMONWEALTH *vs.* MARY MOYLAN.

Essex. Nov. 3. — 18, 1875. WELLS, COLT & MORTON, JJ., absent.

Under the St. of 1875, c. 99, § 12, authorizing the mayor and aldermen of a city, by whom a license to sell intoxicating liquors has been issued, to declare a license forfeited upon proof satisfactory to them of a violation of its conditions, after notice to the licensee and reasonable opportunity for him to be heard by them, a licensee cannot be convicted of selling intoxicating liquors in violation of law upon the production of the record of the board of aldermen, showing only that before the sale the board declared his license "revoked," and parol evidence that the licensee was heard upon a charge of having sold intoxicating liquor on the Lord's day, and upon the question of revocation.

COMPLAINT under the St. of 1875, *c.* 99, for the illegal sale of intoxicating liquors on September 16, 1875, to Margaret Monarch. Trial in the Superior Court, before *Pitman*, J., who allowed a bill of exceptions in substance as follows:

The government introduced testimony tending to show that a sale of intoxicating liquor was made to said Monarch.

The defendant relied upon a license of the first class, mentioned in the St. of 1875, *c.* 99, § 7, issued by the mayor and board of aldermen of the city of Salem, dated May 3, 1875, and authorizing the defendant to sell all kinds of intoxicating liquors at the building where said sale was alleged to have been made to said Monarch, until May 1, 1876.

The government then introduced the record of the board of aldermen of the city of Salem, as follows:

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"Aug. 17, 1875. The committee on licenses to whom was referred the proposed revocation of the license of Mary Moylan, common victualler and liquor dealer, reported verbally, that they had given a hearing to all parties interested, and were of opinion that it was inexpedient to take further action in the matter. The report was accepted. After some discussion, on motion of Alderman Chapman, it was ordered, that the license to sell intoxicating liquors granted by this board to Mary Moylan May 3, 1875, be and the same is hereby revoked."

Parol evidence was offered by the government, tending to show that the defendant had an opportunity to be heard and was heard, upon a charge of having sold liquor on the Lord's day, before the committee on licenses of the board of aldermen of the city of Salem, and upon the question of the revocation of said license. The defendant objected to the introduction of this evidence; but the judge admitted it, and the defendant excepted.

It was not contended on the part of the government that the sale to Margaret Monarch was in violation of any of the conditions of the license.

The defendant then requested the judge to rule that no revocation of the license was proved; but the judge refused so to rule, and instructed the jury that the evidence introduced was competent in law to show a revocation of the license. The jury returned a verdict of guilty; and the defendant alleged exceptions.

H. B. Moulton, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

DEVENS, J. The license, which had been granted to the defendant, was subject to forfeiture in case of her conviction before a court of competent jurisdiction of having violated any of its provisions, or of the St. of 1875, *c.* 99, and it might also be determined by the mayor and aldermen by declaring it forfeited "after notice to the licensee and a reasonable opportunity to be heard by them, or by a committee of their number," upon proof satisfactory to them that she had violated or permitted to be violated any of the conditions thereof." St. 1875, *c.* 99, §§ 6, 12, 13. It should have appeared by their record, in some form, that the mayor and aldermen had upon such proof determined her license forfeited by reason of her violation of the conditions upon which it was to be exercised. They were dealing with that which,

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under this statute, is deemed a valuable privilege, to obtain which the defendant had paid a considerable sum, and of which she was not liable to be deprived except by such a decision. St. 1875, c. 99, § 7. It was not in their power to revoke or recall her license, either arbitrarily, or because they considered it to have been injudiciously granted in the first instance, or for any similar reason. Their power was much more limited, and it cannot be inferred from a vote simply that the license be "revoked," that they have adjudged it forfeited upon proof satisfactory to them, that its conditions had been violated.

Nor is it necessary to determine, in the case before us, whether the deficiency in the recorded vote of the mayor and aldermen could have been supplied by extrinsic evidence that they acted upon proof satisfactory to them, and upon such proof, although using the term "revoked," had determined the license. If the extrinsic evidence admitted be examined, it entirely fails to show that either the committee on licenses (before whom there was a hearing) or the mayor and aldermen ever found the defendant guilty of any breach of its conditions.

Exceptions sustained.

WILLIAM PICKERING, JR. *vs.* JAMES REYNOLDS, JR.

Essex. Nov. 3. — 4, 1875. WELLS, COLT & MORTON, JJ., absent.

The declarations of an occupant of land, in disparagement of his title, are admissible in evidence against one subsequently attaching and levying upon the land as his property.

Upon the issue, on the trial of a writ of entry, whether the tenant, or his father of the same name, under whom the demandant claimed, was grantee in a deed of land to one of that name, the bill of exceptions showed that the demandant introduced evidence tending to show that the father was grantee, that the deed was delivered to him, that after the delivery of the deed he made declarations as to the property when digging a cellar upon the premises, which were excluded in evidence without exception by the demandant. The tenant introduced evidence that his father bought the land with his money, that his father gave him a deed of the land after the action was commenced, and not before, and declarations of the father when digging the cellar that he bought the land for the tenant. The demandant in reply offered evidence of the declarations of the father to other persons, when digging the cellar, and before the action was commenced, that the land was his. This evidence

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was excluded. It was not contended that these declarations were part of the declarations of the father, put in evidence by the tenant. *Held*, that their exclusion, when offered in rebuttal, gave the demandant no ground of exception.

WRIT OF ENTRY, dated December 8, 1868, to recover land in Danvers. Plea, nul disseisin. Trial in the Superior Court, before *Brigham*, C. J., who allowed a bill of exceptions in substance as follows:

The demandant put in evidence the levy of an execution, amended by leave of court and ruled to be sufficient, upon the premises described in his writ, said execution having been issued upon a judgment in an action in which said premises were duly attached on September 24, 1867, as the property of James Reynolds, Sen., and duly set off to the demandant upon said execution on February 22, 1868.

The demandant also put in the deed of Gilbert A. Tapley to James Reynolds, produced by the tenant upon the call of the demandant, and called Tapley as a witness, who testified that he executed the deed, that Reynolds, Sen., paid him the consideration thereof, that he delivered the deed to him at the time of payment; that he saw Reynolds, Sen., upon the premises several times after the delivery of the deed, that he never saw nor spoke to the tenant about the land, and that the tenant was not present when the deed was delivered.

The demandant also offered evidence that Reynolds, Sen., dug a cellar upon the premises after the delivery of said deed; and also, as a part of his evidence in chief, offered the testimony of Frank Eveleth, who testified that he went with Reynolds, Sen., to the cellar, and afterward to the latter's house, where Reynolds, Sen., exhibited to him Tapley's deed of the demanded premises, and made certain declarations, which the judge excluded, without exception by the demandant. The declarations thus excluded were of the same character, and to the same effect, as declarations in relation to the demanded premises, again offered by the demandant in rebuttal of the tenant's case, as hereinafter stated. The demandant then rested his case.

The tenant then testified that he was the son of James Reynolds, Sen., now deceased; that in the year 1862, being at the time sixteen years of age, he enlisted in the United States service, and while in said service on two or three occasions sent his father

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money; that his father received his money paid for enlisting; and was further allowed to testify, under the demandant's objection and exception, as follows: "Some time after said purchase, father said he bought the land for me with money I sent home from the army, and calculated to build a house on it, and would pay for it." On cross-examination the tenant testified that his father handed him the deed after this suit was commenced, and that he never had it before.

The tenant called another witness who was allowed to testify, under objection and exception, that he asked Reynolds, Sen., while he was digging the cellar on the land, and after the said deed had been delivered to him, what he was doing, and he replied as follows: "For my son James, who has come from the war a cripple, and has sent home and saved from his bounty and pay about $300; I wish to get him up a place, so that when I die James will have a home." These declarations were offered for the purpose of showing to whom said land was conveyed.

The demandant then offered in evidence, to rebut the tenant's case, the declarations of Reynolds, Sen., made to other parties at the time of digging said cellar, as follows: "This land is all paid for, and I have a deed of it, and this land is mine." The declarations of Reynolds, Sen., thus offered in evidence, were made before the demandant attached the demanded premises, but it was not claimed that they were a part of any declarations put in evidence by the tenant as above stated. The judge ruled that the evidence offered was incompetent and excluded it.

The jury found for the tenant, under instructions to which no exception was taken; and the demandant alleged exceptions to the said rulings and admission and exclusion of evidence

C. Sewall, for the demandant.

S. B. Ives, Jr., for the tenant.

GRAY, C. J. If the declarations of the elder Reynolds in disparagement of his title were made before the demandant's attachment, they were clearly admissible in evidence against the demandant who claimed under him, and the bill of exceptions does not show that they were made since the attachment.

The declarations of the same person, made at a different time, had no tendency to contradict the first declarations, and, if they were admissible at all, it was because they tended to prove the

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demandant's original case. *Kingsford* v. *Hood*, 105 Mass. 495. The demandant did not except to their exclusion when offered in chief, and has no right of exception to their exclusion when offered in rebuttal. *Wheeler* v. *Wheeler*, 116 Mass. 297. *Wallace* v. *Taunton Street Railway*, *ante*, 91.

Exceptions overruled.

BOSTON AND MAINE RAILROAD *vs.* SALOME D. MONTGOMERY & others.

Essex. November 5, 1875. WELLS, COLT & MORTON, JJ., absent.

Upon the assessment of damages sustained by the taking of land for a railroad, it appeared that the estate out of which the land was taken was a farm, and that the land taken was on the bank of a river. The bill of exceptions stated that a farmer who had lived many years in the vicinity of the land, and had known of sales of land in the neighborhood, and was allowed without objection to testify as to the value of the land taken, and of the inconveniences resulting to a farmer from being deprived of access to the river, was asked what in his opinion was the damage to the remainder of the farm of the loss of the river bank, which was excluded; that the petitioner also claimed damages by reason of being excluded from the river bank for purposes of fishing and from a fishing ground, but that it did not appear that the witness had any special or superior knowledge on the subject of fishing or of fishing grounds; and that other witnesses for the petitioner testified to the value of the river bank as affording facilities for fishing. *Held*, that the bill of exceptions disclosed no error in the exclusion of the farmer's testimony.

PETITION for a jury by a railroad corporation dissatisfied with the assessment by the county commissioners of damages to the respondents' land, occasioned by the taking of a portion of it by the petitioner for a railroad. Trial in the Superior Court, before *Allen*, J. who allowed a bill of exceptions in substance as follows:

It appeared that the estate out of which the land was taken bounded upon the Merrimack River, and was occupied as a farm, and that the land so taken and cut off was next to the river.

A witness who was a farmer and had lived many years in the vicinity of this land, and had known sales of land in the neighborhood, and was allowed without objection to testify as to the value of the land taken, and of the inconveniences resulting to a

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farmer by being excluded from access to the river, was asked what, in his opinion, was the damage to the remainder of the farm by reason of the loss of the river bank, and, in another form, how much, if any, the remainder of the farm was diminished in value by reason of the taking and cutting off by the railroad of the river bank. The corporation objected to this question. The judge sustained the objection, and ruled in effect that the substance of the question in any form was inadmissible.

Among other elements of damage, the landowners claimed damages by reason of being excluded from the river bank for purposes of fishing and from a fishing ground, and it did not appear that this witness had any special or superior knowledge on the subject of fishing or of fishing grounds. Witnesses subsequently introduced by the landowners testified as to the value of the river bank as affording facilities for fishing.

The landowners, being dissatisfied with the amount awarded by the jury, alleged exceptions.

H. N. Merrill, for the landowners.

H. Carter, for the corporation, was not called upon.

By the Court. The bill of exceptions shows that the witness was allowed to estimate in money the value of the land taken, and leaves it at least doubtful whether he was not allowed to estimate in the same way the amount of the inconveniences resulting to a farmer from being deprived of access to the river — so that the consequent diminution in value would be ascertained by deducting the one sum from the other, which could easily be done by the jury — and does not show that the owners of the land claimed damages by reason of being excluded from the river bank for any purposes as to which the witness had any special or superior knowledge. The landowners therefore fail to sustain their exceptions. ***Exceptions overruled.***

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JAMES D. MARTIN & others *vs.* AMOS P. TAPLEY.

Essex. Nov. 6. — 9, 1875. WELLS & MORTON, JJ., absent. ENDICOTT, J., did not sit.

An *amicus curiæ* is heard only by the leave and for the assistance of the court, and upon a case already before it; he has no right to take the case up, by bill of exceptions or otherwise.

After verdict for the plaintiff in an action of contract, the defendant died, and the plaintiff moved the court to strike from the record a plea of discharge in bankruptcy filed by the defendant since the verdict, and to enter judgment *nunc pro tunc* as of a term before his death. At the hearing of these motions, no executor or administrator of the defendant having been appointed, his heir, and the sureties on the bond given to dissolve the attachment on the writ, were allowed by the presiding judge to appear for the purpose of being heard on these motions, but not as parties to the suit; and the counsel of the deceased defendant was heard in their behalf, and as *amicus curiæ*. *Held*, that neither the heir, nor the sureties, nor the *amicus curiæ*, could allege exceptions to an order of the judge granting the motions.

PETITION to establish the truth of exceptions. The material facts, appearing by the records referred to in the petition were as follows:

An action of contract, brought by Amos P. Tapley against Lucretia W. Martin, was tried at November term 1870 of this court in Essex, and a verdict returned for the plaintiff, and exceptions taken by the defendant at the trial were allowed by the presiding judge, and entered upon the law docket in that county at November term 1871. On February 26, 1872, the defendant pleaded a certificate of discharge in bankruptcy, obtained January 20, 1872, in the District Court of the United States for the District of Maryland. On June 15, 1874, Ambrose A. Ranney, Esquire, the attorney for the defendant, suggested of record that her death occurred June 12, 1874. On October 22, 1874, the plaintiff filed a motion that the plea of discharge in bankruptcy be taken off the record of this court, upon the ground that it would appear from an inspection of the whole record and final decree of the United States Court (copies of which were produced) that the certificate of discharge had not been granted, but had been refused. In November, 1874, the exceptions taken at the trial were argued by Mr. Ranney, as *amicus curiæ*, and by the counsel for the plaintiff, and overruled. See *Tapley* v. *Martin*, 116 Mass. 275.

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At a subsequent hearing before *Wells*, J., on motions of the plaintiff that the plea of discharge in bankruptcy be ordered to be taken off the record, and that judgment be entered for the plaintiff *nunc pro tunc* as of November term 1871, James D. Martin, the son and heir of the deceased defendant, and Andrew C. Mudge and Penfield B. Goodsell, the sureties upon the bond given by the defendant to dissolve the attachment upon the writ, were "allowed to appear for the purpose of being heard upon the pending motions to strike off the plea of bankruptcy and to enter judgment *nunc pro tunc*, but not as parties to the suit;" Mr. Ranney, counsel for the defendant in her lifetime, was heard as *amicus curiæ*, and also as counsel for the heir and the sureties; and it was ordered "that said motions be granted, and that said plea of discharge in bankruptcy be taken off the record of this court — it appearing that the alleged discharge, a copy of which was filed in support of said plea, was vacated by the court by which it purported to have been granted, before the filing of said plea, and at the term at which the alleged discharge was granted, and upon a final hearing and adjudication thereon a discharge was refused in the defendant's lifetime" — and that judgment be entered for the plaintiff in this action *nunc pro tunc* as of November term 1871.

Mr. Ranney, as counsel for the defendant during her lifetime, and as *amicus curiæ*, and as attorney of the heir and the sureties, tendered a bill of exceptions to this order and to various rulings at the hearing upon the motions; and the bill of exceptions was disallowed by the judge.

The heir, the sureties, and Mr. Ranney, as counsel for the deceased defendant and as *amicus curiæ*, thereupon filed this petition to establish the truth of the exceptions so tendered; alleging the facts above stated, and also that the defendant died leaving no estate of any kind in this Commonwealth, and there had never since been any property, effects or credits here to be administered upon, and therefore no letters of admininistration, either original or ancillary, had been or could be granted here; and that the exceptions alleged were true, and were disallowed by the judge solely because neither of the petitioners was so far a party to the suit or so far related to it as to be entitled to be allowed or to prosecute a bill of exceptions.

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The petitioners moved that the petition be referred to a commissioner to hear the parties and report the facts to the court. The original plaintiff moved to dismiss the petition, because the petitioners were not entitled to allege exceptions.

F. W. Hurd, (*A. A. Ranney* with him,) for the petitioners. This is a petition to prove exceptions taken to the right of the court to enter judgment for the plaintiff *nunc pro tunc* after the death of the defendant. The objection is raised that there is no party before this court to take exception. The theory upon which such a judgment is entered is, that the court by a fiction goes back to the time when the parties were living, and enters such judgment as would then have been entered but for the delay of the law. This is expressed in *Currier* v. *Lowell*, 16 Pick. 170, 173, as follows: "The court will go back to the time when the judgment might have been rendered on the verdict, if no motion had been made which prevented it." In *Kelley* v. *Riley*, 106 Mass. 339, 342, it is said that "the court in now rendering judgment will go back to the time when it would have been rendered if no action had been taken to prevent it." In *Bridges* v. *Smyth*, 8 Bing. 29, 32, Tindal, C. J., said: "The case therefore does not depend on the St. of Car. II., but on the rule of common law, that where parties are hung up by act of the law, neither of them loses his right, but eventually judgment is entered *nunc pro tunc*, as if the party were still alive." Similar expressions are found in a great number of cases. Freeman on Judgments, (2d ed.) § 56 *& seq.*

If this is the theory for the purpose of entering judgment, is it not the same for the purpose of showing cause why such judgment should not be entered? In *Miles* v. *Bough*, 15 L. J. (N. S.) Q. B. 30, 32, Wightman, J., said: "If it could be shown that the defendants or any third person would be prejudiced by entering the judgment as prayed, that would no doubt be ground for the court refusing to interfere; but in the absence of any well founded objection of that kind, it appears to me that the rule for entering the judgment *nunc pro tunc* must be made absolute."

The cases are numerous where arguments have been entertained by courts upon their power to render a judgment *nunc pro tunc* after the death of one party, and no suggestion has ever

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been made that there was no party in court competent to resist the motion. The arguments proceed upon the fiction that they are had while the parties are living. *Currier* v. *Lowell*, 16 Pick. 170. *Mayor of Norwich* v. *Berry*, 4 Burr. 2277. *Abington* v. *Lipscomb*, 11 L. J. (N. S.) Q. B. 15. *Miles* v. *Williams*, 9 Q. B. 47; *S. C.* 16 L. J. (N. S.) Q. B. 56. *Griswold* v. *Hill*, 1 Paine C. C. 483. *Heathcote* v. *Wing*, 11 Exch. 355. *Freeman* v. *Tranah*, 12 C. B. 406.

The petitioners were allowed to be heard before a single judge as to whether or not the record in this case was ready for final judgment; and if allowed to be heard upon that question there, have they not the right to ask a review of the ruling made upon matters of law? They were admitted as parties so far as the motion to enter judgment was concerned, and ask now only to be heard upon that same motion. In *Kelley* v. *Riley*, 106 Mass. 339, the exceptions were allowed after death of the party excepting. In *Freeman* v. *Rosher*, 13 Q. B. 780, after verdict for the plaintiff, with leave reserved to move a nonsuit or verdict for the defendant, the defendant died before a motion could be made; and the rule *nisi* was afterwards obtained in his name. Suppose in *Kelley* v. *Riley* the exceptions as filed had been disallowed; might they not have been proved? It may be said that in the above cases the exceptions were taken while the parties were living, but they were such as must have been taken at or before verdict, which could only be had while the parties were living; in the case at bar, the exceptions arise from proceedings that could only be taken after the death of one of the parties. Now it must either be held that the court proceeds *ex parte* in fiction as well as in fact, in allowing judgment *nunc pro tunc* after death of one of the parties, or that the decision of a single judge is final upon the legal power to enter such a judgment. Suppose, when *Kelley* v. *Riley* was sent back to the Superior Court, a question had arisen as to the legal power of the court to enter judgment; would the decision of a single judge of the Superior Court have been final?

O. W. Holmes, Jr., contra.

GRAY, C. J. The authorities cited for the petitioners show that the counsel for a deceased party might be heard as *amicus curiæ* before the full court, if the exceptions sought to be estab-

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lished had been allowed and entered in his client's lifetime: because the delay in disposing of them would be deemed the act of the court; *Tapley* v. *Martin*, 116 Mass. 275; *Bridges* v. *Smyth*, 8 Bing. 29; *S. C.* 1 Mo. & Sc. 93; *Miles* v. *Williams*, 9 Q. B. 47; or if the exceptions had been taken by the party in his lifetime, though not allowed or entered until after his death; because they would be his own exceptions, seasonably alleged and tendered by himself, and the subsequent allowance and entry of them might be treated as mere forms to put them in order for hearing; *Kelley* v. *Riley*, 106 Mass. 339; or if the ruling below had been in his favor, and the questions of law reserved on the motion of the other party; *Currier* v. *Lowell*, 16 Pick. 170; or if the questions of law had been reserved by the judge himself at the trial or hearing, and brought before the full court by his report, or by motion pursuant to leave so reserved. *Springfield* v. *Worcester*, 2 Cush. 52, 62. *Freeman* v. *Rosher*, 13 Q. B. 780.

But the difficulty in this case lies deeper. None but a party to a suit has a right to allege exceptions, or to file a petition to establish the truth thereof. Gen. Sts. *c.* 115, §§ 7, 11. At the time when these questions of law were first raised, the defendant was dead, and no executor or administrator had, so far as appears, been appointed or named. The heir of the defendant had no right to appear as a party to a personal action. The sureties upon the bond to dissolve the attachment were not, and could not be made, parties to the action in their own name; and they could not use the name of the defendant, because she was dead, nor of her executor or administrator, because it does not appear that there was any. Both the heir and the sureties were allowed to come in and be heard, not as parties to the suit, but, just as any stranger might be, for the information of the judge before whom the motions were pending. The counsel for the deceased defendant had no right to be heard as such, because his authority to act in her behalf had been revoked by her death. Like the heir and the sureties, he could be heard only as *amicus curiæ*. An *amicus curiæ* is heard only by the leave and for the assistance of the court, and upon a case already before it. He has no control over the suit, and no right to institute any proceeding therein, or to bring the case from one court to another, or from a single judge to the full court, by exceptions, appeal or writ of

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error. 4 H. VI. 16, pl. 16. *Isley's case*, 1 Leon. 187. Vin. Ab Amicus Curiæ. *Knight* v. *Low*, 15 Ind. 374.

None of the petitioners being parties to the suit, the exceptions alleged by them were not legally alleged, and were rightly disallowed by the presiding judge, and the petition to establish the truth of them must be *Dismissed.*

JOSIAH B. THOMAS & another *vs.* BUILDERS' MUTUAL FIRE INSURANCE COMPANY.

Essex. Nov. 4. — 17, 1875. WELLS, COLT & MORTON, JJ., absent.

A policy of insurance against fire which contains a provision that if the assured "shall have made or shall hereafter make any other insurance upon said property without the knowledge or consent of this company, in writing, then in such case this policy shall be void," is not defeated by the taking of a subsequent policy which is invalid by reason of the failure of the assured to obtain the assent of the company issuing it to the existence of other insurance upon the property as required by the terms of that policy; and the assured may set up the invalidity of the second policy, in an action by him upon the first policy, although he has received payment of the second policy from the insurer.

CONTRACT upon a policy of insurance against fire, issued by the defendant to the plaintiffs. At the trial in the Superior Court, before *Brigham*, C. J., the defendant declined to argue the case to the jury under the instruction of the presiding judge, submitted to a verdict for the plaintiffs, and alleged exceptions to the rulings of the judge and to his refusal to rule as requested, the substance of which appears in the opinion.

W. F. Slocum, for the defendant.

S. B. Ives, Jr., for the plaintiffs.

DEVENS, J. Many questions which were discussed at the trial and also at the hearing at bar, need not be considered, as there is one ground which we deem to be conclusive against the defence here sought to be established.

The policy of insurance, issued by the defendant upon December 13, 1872, and taking effect on that day, was for the term of three years, and contained the express condition "that if the assured shall have made or shall hereafter make any other insurance upon said property without the knowledge or consent of

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this company in writing, then in such case this policy shall be void."

On December 19, 1872, a policy of insurance was issued to the plaintiffs by the Merrimack Mutual Insurance Company, upon certain property of the plaintiffs for the term of five years. The loss occurred within the time included in both policies. The defendant offered evidence to prove that the latter policy with other property covered also the property insured by the defendant which was destroyed by fire, and contends that as there was no knowledge of or consent to such reinsurance there can be no recovery upon the policy here sued on.

Assuming the defendant to have proved that the property insured by it was covered by the instrument issued by the Merrimack Company as a policy, it is for the defendant to show that such instrument was a valid and legal policy, effectual and binding upon the insurers. If it was invalid so far as the property in question was concerned, there would by legal intendment be no second insurance upon it, and therefore no avoidance of the first policy.

The policy of the Merrimack Company was also upon the condition "that without the consent of this company no other insurance shall exist" upon the property insured by it, and no such consent was given. The Merrimack Company was to have been the subsequent insurer of this property, (if it was in terms covered by its policy,) and the plaintiffs therefore failed to do what was necessary in order that a contract might be perfected with it, and having effected no valid subsequent insurance, they have not avoided the prior policy with the defendant. The whole question comes clearly within the decided cases. *Jackson* v. *Massachusetts Mutual Fire Ins. Co.* 23 Pick. 418. *Clark* v. *New England Mutual Fire Ins. Co.* 6 Cush. 342. *Hardy* v. *Union Ins. Co.* 4 Allen, 217.

Nor is the fact that the plaintiffs have received payment from the Merrimack Company upon their policy important in this connection. The inquiry here is simply whether there was a valid insurance at the time, and this is not affected by what the plaintiffs or the Merrimack Company saw fit to do afterwards. Those acts can in no way have affected injuriously the defendant, so as to estop the plaintiffs from asserting that there was no valid

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policy issued by the Merrimack Company, nor can they alter the rights of the parties. *Hardy* v. *Union Ins. Co.*, *ubi supra*. *Bardwell* v. *Conway Ins. Co.* 118 Mass. 465. *Philbrook* v. *New England Ins. Co.* 37 Maine, 137. *Exceptions overruled.*

SWAMSCOTT MACHINE COMPANY *vs.* JOHN R. PERRY & wife.

Essex. Nov. 6. — 19, 1875. WELLS, COLT & MORTON, JJ., absent.

If a debtor has mortgaged land, by the intervention of a third person, to his wife, without consideration and in fraud of creditors, and the wife has never taken possession, and no mortgage debt exists, but the husband remains in possession, a creditor to whom a portion of the land has been set off on execution against the debtor, and possession delivered, has a full, adequate and complete remedy at law by writ of entry against the debtor, and cannot maintain a bill in equity to obtain a release from the wife of all her right in the land set off.

BILL IN EQUITY by the Swamscott Machine Company, a corporation established under the laws of the State of New Hampshire, against John R. Perry and Cornelia B. Perry, his wife, alleging the following facts:

On August 1, 1871, John R. Perry was seised in fee of a tract of land in the city of Lawrence in this Commonwealth; and on that day executed and delivered to George S. Armstrong a promissory note payable to Armstrong or order, for the sum of $6200, and at the same time executed and delivered to Armstrong a mortgage deed of said tract of land, conditioned for the payment of the note to Armstrong when due, which deed was duly acknowledged and recorded.

On December 18, 1871, Armstrong, by his deed of that date, assigned the mortgage deed and the debt secured thereby to Cornelia B. Perry and indorsed to her the said note. This deed was duly recorded. Cornelia B. Perry has never taken possession of the premises, but they remain in the possession of her husband.

On January 9, 1874, the plaintiff recovered judgment in the Superior Court for the county of Essex against John R. Perry for the sum of $1587.23, on which judgment execution issued on January 21, 1874, and on February 3, 1874, the plaintiff caused the execution to be levied on a certain described portion of said

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land, subject to the inchoate right of dower of Cornelia B. Perry. Seisin and possession of said tract were delivered thereunder to the plaintiff, who has remained and now is in possession thereof; and thereupon the execution was returned by the officer as fully satisfied with all costs by the levy, and the execution and the return thereon were recorded in the registry of deeds and returned to the court issuing the same, and the right of redeeming the levy has expired.

The levy was not made subject to the said mortgage, nor the amount thereof deducted from the value of the land as estimated by the appraisers, but the land was set off to the plaintiff at its full value.

The bill further alleged that the defendants fraudulently colluding together and contriving to defeat the creditors of John R. Perry and to transfer and secure to his wife a part of his property, made the said mortgage deed, note and assignment; that the note was without consideration as between John R. Perry and Armstrong, and that Cornelia B. Perry paid nothing therefor to Armstrong; that there is not now existing and due any debt whatever which the mortgage secures; that the note has, as a matter of law, become void and of no effect; that Cornelia B. Perry now claims that the mortgage is a valid lien and incumbrance on the land, and is threatening and intending to enter under the same and expel the plaintiff as soon as it shall become lawful for her so to do, and that the mortgage is a cloud upon its title.

The prayer of the bill was that Cornelia B. Perry might be ordered to execute to the plaintiff a release of all right or claim in or to the tract of land set off to it on the levy, and for further relief.

The defendant Cornelia B. Perry demurred for want of equity. The case was heard on the bill and demurrer by *Endicott*, J., the demurrer sustained, and the bill dismissed. The plaintiff appealed.

N. W. Harmon, for the defendants.

C. U. Bell, for the plaintiff. The allegations of the bill show that the plaintiff has title in part of the land. That title gives it the right to question the mortgage of Mrs. Perry and inquire into its present validity, and claim a discharge of it, if it

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secures no debt. The bill shows that there was no debt at the date of the levy, the note being without consideration and not taken by Mrs. Perry for value. This is not charged as a fraudulent conveyance because voluntary, but only to determine the amount to be paid to redeem. Although the facts charged might prove fraud, the plaintiff is not obliged to take that view of them. It has an election to rely on fraud or not.

The note has become void because it is now the property of the maker's wife. *Bassett* v. *Bassett*, 112 Mass. 99. *Chapman* v. *Kellogg*, 102 Mass. 246.

It is the province of a court of equity to order the discharge of mortgages, where, after breach of the condition, the debt is discharged. Here the condition, which was the payment of $6200, has never been performed, but has been broken, while the debt is cancelled. *Howard* v. *Howard*, 3 Met. 548.

2. A writ of entry would not lie, as the legal title was in Mrs. Perry. *Parsons* v. *Welles*, 17 Mass. 419. *Bigelow* v. *Willson*, 1 Pick. 485. *New England Jewelry Co.* v. *Merriam*, 2 Allen, 390. Nor a petition to quiet the title, as the plaintiff was not in actual possession taking the profits. The bill alleges that John R. Perry, one of the defendants, is in possession. *Munroe* v. *Ward*, 4 Allen, 150. It is in its nature a bill to redeem, of which the court has jurisdiction. There are two rights which cannot be settled in one action at law, that of Mrs. Perry and that of the holder of the rest of the land. Gen. Sts. *c.* 113, § 2, *cl.* 6.

GRAY, C. J. Upon the facts stated in the bill, the plaintiff has the legal title; John R. Perry, one of the defendants, has the possession, without any title; and his wife, the other defendant, has neither title, nor possession, nor immediate right to take possession. The plaintiff has a full, adequate and complete remedy at law, by writ of entry against John R. Perry, and cannot therefore maintain this bill. *Dolby* v. *Miller*, 2 Gray, 135. *Clark* v. *Jones*, 5 Allen, 379. *Commonwealth* v. *Smith*, 10 Allen, 448. *Jones* v. *Newhall*, 115 Mass. 244. *Decree affirmed.*

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LEONARD F. LAWRENCE *vs.* CITY OF BOSTON.
WILLIAM B. FOWLE *vs.* SAME.

Suffolk. November 9. — 10, 1875. WELLS & ENDICOTT, JJ., absent.

On the trial of a petition by the lessee of a part of a building, for the assessment of damages occasioned by the taking by a city of land, on which the building stood, to widen a street, it appeared that the owner of the estate surrendered the entire estate to the city by a deed in which he covenanted to indemnify the city against all claims for damages, and that in pursuance of this agreement he defended the action. *Held*, that declarations by him as to the value of the lease, made after notice to him of the taking and before his agreement with the city, were not admissible in evidence except to contradict him.

On the issue of the value to the lessee of rooms in a building which had been taken by a city to widen a street, it is within the discretion of the judge presiding at the trial to permit a witness who underlets rooms in a building in the vicinity, and who, for this purpose, has informed himself generally of the rents of buildings, to give an opinion as to the value of the lessee's premises, although he has not examined, and is not familiar with, the building in question.

On the trial of a petition under the St. of 1871, *c.* 382, § 7, by the lessee of a part of a building, for the assessment of damages occasioned by the taking of the land on which the building stood, by a city to widen a street, the jury were instructed in substance that the value of the lease was its market value; that market value meant the fair value of the property as between one who wanted to buy and one who wanted to sell, irrespectively of peculiar circumstances rendering the lease of greater value to the lessee or of a desire on his part to retain the premises. No special objection was taken to this instruction, but the petitioner requested the further instruction that in determining the value of the lease the jury were to consider, among other things, the amounts which persons desiring to take the lease would be willing to give therefor, not excluding the amounts which the petitioner himself would give. The judge stated that he had no objection to giving this instruction with the modification, "if the petitioner is in the market for the lease." *Held*, that the petitioner had no ground of exception to the refusal of the judge to give the instruction without the modification. *Held*, *also*, that the petitioner had no ground of exception to the refusal of the judge to instruct the jury, as requested by him, that the statute entitled all persons whose property was taken for public uses, to receive damages for the value thereof, that the term "market value" was not used in the statute, and that the lessee was entitled to compensation for any value the property might have other than a market value.

TWO PETITIONS to the Superior Court under the St. of 1871, *c.* 382, § 7, for a jury to assess damages for the taking by the respondent of the land on which the Boston Post building stood, on the corner of Water Street and Devonshire Street, in Boston, to widen Water Street, the petitioners having a leasehold estate therein. Trial in the Superior Court, before *Putnam*, J., who allowed a bill of exceptions in substance as follows:

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The land and building belonged to James H. Beals and others. The petitioner Lawrence held a lease from them of a store on the first story on Water Street, which would terminate November 4, 1878. The petitioner Fowle held a lease from one Apthorp of a room on the second story on Devonshire Street, which would terminate May 1, 1875. Apthorp held a lease from the owners of the same and other premises which would terminate at the same time.

The city determined, April 18, 1873, to widen Water Street by taking a portion of the estate. On March 31, 1873, the owners notified the city that they objected to the proposed widening, and elected to surrender the entire estate to the city. On November 15, 1873, the city determined to take the entire estate for the purpose of the widening. Subsequently the owners settled with the city for the value of the estate, and in consideration of $325,000 paid to them, and of the use of the building till September 1, 1874, and the remission of taxes for that year, the owners conveyed the estate to the city, on April 15, 1874, and in their deed covenanted to indemnify the city against all claims for damages on account of the granted premises or the taking thereof. The owners notified the tenants that they must remove on September first.

It was conceded that in pursuance of this agreement the present suit was defended in fact by the owners of the estate.

At the trial James H. Beals was called as a witness for the petitioners, and testified that he appeared in behalf of himself and other owners before the city authorities during the negotiations which resulted in the settlement with the city. The petitioners then offered to show by this witness that he made representations to the committee that the owners would have to pay large damages to these tenants, and that these rooms could be let for more than the rent reserved in the existing leases, also as to the amount at which the office occupied by Beals, Green & Co. in the building, which office adjoined Lawrence's store, could then be let. The counsel offered this evidence, not as in any way controlling Beals's statements at this trial. He was not asked his opinion as to the value of the leases, but counsel stated that they offered this evidence as admissions heretofore made by the said Beals. The judge excluded the testimony, and the petitioners alleged exceptions.

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The respondent called Charles W. Freeland to testify as to his opinion of the rental value of premises occupied by the petitioners. The witness testified that he was lessee under a long lease of a building known as the City Exchange, on Devonshire Street, about one hundred and fifty feet from the corner of Water Street and Devonshire Street, which building he underlet, and that he made it a part of his business to underlet this building, and that he attended to letting tenements not exceeding twenty in that building; that his knowledge of the value of leases outside of his own building was not very extensive; that he was not in the habit of making any inquiries as to what other people were doing; that he had general knowledge of what certain things would rent for per square foot; that for the purpose of letting this building he had informed himself generally of the rents of buildings; that knowledge came to him by the way of people coming to make inquiries, and when he talked about the rent of his building they would tell him what they could hire in such a building for such a price; that he had not sought the knowledge, but it came to him in that way; that he had been consulted a great many times by owners of buildings as to rents, but he could not state any particular territories as to which he was thus consulted, and that he had hired a building for his business on Winthrop Square. It did not appear that the witness had examined the Boston Post building. The petitioners thereupon objected that the witness was not qualified to testify as to his opinion of the value of the petitioners' premises. But the judge permitted him to testify thereto, and the petitioners excepted.

The judge instructed the jury as follows: "The value of the leases is their market value; 'market value' means the fair value of the property, as between one who wants to purchase and one who wants to sell any article, not what could be obtained for it under peculiar circumstances, when a greater than its fair price could be obtained; not its speculative value; not a value obtained from the necessities of another. Nor, on the other hand, is it to be limited to that price which the property would bring when forced off at auction, under the hammer. It is what it would bring at a fair public sale, when one party wanted to sell and the other to buy. The fact, therefore, that one of these lessees, Lawrence, as had been argued by his counsel, did not want

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to move, wanted to stay there, would have paid a very large sum to stay there, is not a test of market value, because it is not a case of one who wants to sell and one who wants to buy. If Lawrence had wanted to go out, the question is, what would his lease have brought? Not what it would have been worth to him if he had wanted to stay there, because it may have been of greater value or of less value to him than its value upon the market. That simply determines its value to him, not its market value. The question for you to consider is, if Lawrence wanted to sell this lease, what could he have obtained for it upon the market, from parties who wanted to buy and would give its fair value?" No specific objection was taken to this charge, but the counsel for the petitioners then asked the judge to give this instruction: "In determining the value of the leasehold estate, the jury are to consider among other things the amounts which persons desiring to take the leases would be willing to pay for the same, not excluding from such consideration the amounts which the petitioners themselves would give." The judge stated that he had no objections to giving this instruction, with this modification, "if the petitioners are in the market for the lease; but if they, rather than be turned out, would give more than anybody else, that is not the market value of the lease," and did so give it. The counsel contended that it should be given without the modification; and excepted to the refusal of the judge so to do.

No evidence was offered of any other than the market value of the leases upon either side, or that the petitioners would have been glad to stay if they could do so, or what they would be willing to pay for the leases if they could stay; but the petitioners testified as to the conveniences of the tenements for their purposes, and it was conceded for this trial by the respondent, and the judge so instructed the jury, that in estimating the rental value for the remainder of the term, they might assume that the lease could be renewed at a fair rental.

The petitioners' counsel then asked the judge to give this instruction: "The statute entitles all persons, whose property has been taken for public uses, to receive damages for the value thereof; the term 'market value' is not used in the statute, and it may be that property has value other than a 'market value,'

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and for that the tenant is entitled to compensation." The judge declined to give this further qualification of his rulings; and the petitioners alleged exceptions.

S. J. Thomas, for Lawrence.

R. M. Morse, Jr., for Fowle. 1. The admissions of Beals, one of the owners, as to the rental value of the premises in question, and those adjoining the same, were competent evidence. The suit was defended by the owners under a covenant to indemnify the city. Upon the question of value, it would have been competent to inquire of the owners as to their opinion. *Dickenson* v. *Fitchburg*, 13 Gray, 546. It was equally competent to inquire as to their declarations as to the same.

2. Freeland was not qualified to testify as to the rental value of these premises. The premises were rooms in a building. Some personal examination was necessary to authorize a witness otherwise qualified to testify as to value. Even in the case of land a certain familiarity with it has been deemed essential. *Fowler* v. *County Commissioners*, 6 Allen, 92. But in respect to rooms personal inspection is especially needed, in order to appreciate properly such essential conditions as the amount of light, manner of fitting up, convenience for various uses, &c. It did not appear that Freeland had examined the rooms in question or had any acquaintance with them. He had "a general knowledge of what certain things would rent for per square foot;" he had informed himself generally as to the rents of buildings, and a part of his business was to let a building in the vicinity. This knowledge and experience may have sufficed to enable him to testify as to these rooms, if he had examined or had been familiar with them, but was not sufficient without such knowledge.

3. The instructions of the court as to the value of the leasehold estates were inaccurate and calculated to mislead the jury, first, in using the term "market value" as synonymous with "value," and second, in a misstatement of the elements to be considered by the jury in determining it. The St. of 1871, *c.* 382, § 5, provides that in the taking of an entire estate, after surrender to the city, the owner shall receive the "value" thereof. The Legislature, it is believed, has never used the term "market value" in connection with the taking of land, as synonymous with "value." In *Dwight* v. *County Commissioners*, 11 Cush. 201,

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203, the court said, "the market value is a near and perhaps the closest approximation to the true value; not that it is the same thing. In *Edmands* v. *Boston*, 108 Mass. 535, the Superior Court used the term "market value" as defining the value for which the petitioners were entitled to compensation, and the expression was repeated in the opinion of this court; but it does not appear that the court intended to sustain the accuracy of the expression. In *Cobb* v. *Boston*, 112 Mass. 181, the expression is also used. With these exceptions, it is believed that there is no case in which this court has held that the terms "value" and "market value," as applied to property taken for public uses, are synonymous. But assuming that the objection to the term "market value" is not well founded, or that it is immaterial, if the jury were instructed accurately or sufficiently favorably to the petitioners as to its meaning, then it is submitted that the instruction was incorrect in excluding from the consideration of the jury the amounts which the petitioners themselves would give for the premises, unless "the petitioners were in the market for the lease." "The value to him . . . . was the measure of his (the owner's) claim to indemnity." Shaw, C. J., in *Patterson* v. *Boston*, 20 Pick. 159, 166. "A fair compensation for the property taken and injury done, ascertained by general rules, is a substitute to the owners for that of which they are deprived." Wells, J., in *Edmands* v. *Boston*, 108 Mass. 544. See *Robb* v. *Maysville Turnpike Co.* 3 Met. (Ky.) 117. "The question for the jury was, what was a proper price, or in other words, what was the value of the land taken?" Ames, J., in *Pinkham* v. *Chelmsford*, 109 Mass. 225, 228.

The petitioners were entitled to have instructions substantially to the above effect. The jury, in determining the true value of the premises, were bound to consider all the evidence as to the actual demands that existed for them, their adaptation to all persons, including the owners, the opinions of experts and their own general knowledge and experience on the subject. It may be difficult to give an exact definition of the term "value" as it is of "ordinary care." There was, as the petitioners submit, no necessity for elaborating a definition to the extent undertaken by the court. But if the elements of value needed to be stated with greater minuteness than this court has hitherto found necessary,

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it is submitted that there is no reason or authority for excluding, as one of such elements, the actual value of the premises, as they were at the time of the taking, to the person from whom they were taken, under the circumstances under which they were taken. The natural and inevitable tendency of the instruction was to impress on the jury that they were to give the tenant only what the lease would bring at a fair public sale, where the party most liable to offer the true value was excluded from the competition.

G. O. Shattuck & M. Storey, for the respondent, were not called upon.

GRAY, C. J. Beals was not a party to the record. He defended this suit, not by reason of any relation to the city, or liability for the act for which this suit was brought, when that act was done, but by virtue of a subsequent contract between himself and the city. His previous declarations, made when his interests were adverse to those of the city, were not admissible in evidence, except to contradict him; and not being offered for that purpose, they were rightly excluded.

The question whether Freeland was qualified to testify to his opinion of the value of the premises was within the discretion of the presiding judge, and no error in law is shown in the exercise of that discretion.

The instructions to the jury were such as have been usually given in similar cases in this Commonwealth, and were correct and sufficient. *Exceptions overruled.*

BENJAMIN F. BROOKS & others *vs.* JAMES M. CUTTER & others.

Suffolk. November 10, 1875. WELLS & ENDICOTT, JJ., absent.

A lease of rooms in a building, which provided that in case of the destruction of the premises by fire the rent should be suspended or abated, was surrendered to and accepted by the lessor in consideration of three notes made by the lessee payable to the lessor at different dates. The first two notes were duly paid, and before the last note was due, the premises were destroyed by fire. *Held*, that the lessee was liable for the amount of the last note when due.

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CONTRACT by Benjamin F. Brooks, Edward A. White, and Joseph Sawyer, trustees under the will of John Simmons, upon a promissory note for $1167, dated April 1, 1871, signed by the defendants, payable to Edward A. White, trustee, who indorsed it in blank. The case was submitted to the Superior Court, and after judgment for the plaintiffs for the amount of the note, to this court, on appeal, upon agreed facts, in substance as follows:

The defendants executed the note and are liable to pay the same to the plaintiffs, unless the following facts constitute a defence.

On November 2, 1868, John Simmons executed to the defendants a lease of the basement and lower floor of the four-storied store No. 89 Devonshire Street, Boston, at an annual rent of $3000, payable in equal quarterly instalments of $750 each, for the term of five years from October 1, 1869. The lease contained the following provision: "And provided, also, that in case the premises, or any part thereof, shall, during said term, be destroyed or damaged by fire or other unavoidable casualty, so that the same shall be thereby rendered unfit for use and habitation, then, and in such case, the rent hereinbefore reserved, or a just and proportionate part thereof, according to the nature and extent of the injury sustained, shall be suspended or abated until the said premises shall have been put in proper condition for use and habitation by the said lessor, or these presents shall thereby be determined and ended at the election of the said lessor or his legal representatives."

The defendants paid the rent, and the obligations of the lease were fully complied with on both sides, until April 1, 1871. In the mean time John Simmons had died, and the plaintiffs, trustees under his will, had become invested with all his rights as lessor of the demised premises.

Before April 1, 1871, the defendants had moved out of the premises, and negotiations had been pending for some time between them and the plaintiffs, having in view the assumption of the premises by the latter. On the last named date the plaintiffs sent the defendants the following letter with reference thereto: "Boston, April 1, 1871. Messrs. Cutter, Tower & Co., Boston. Gentlemen, — I have had a conference with the other trustees, and we have agreed to renew the proposition last made to you in

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reference to assuming the lease of the store on Devonshire Street, belonging to the estate. You to pay the rent to this date, and we will assume the balance of the lease by your paying to the trustees the sum of one thousand dollars per annum, and at that rate for any part of a year, and payable at the quarter day as had been said rent, you giving your note or notes for the same, if not paid in cash at this time.

"The trustees to put the property in condition to rent, you to pay the expense of the same, and what to be done you will please agree with Mr. White about as being proper and necessary. Your acceptance of the above or rejection we would like to-day, as if it is to come into our hands we wish to enter upon it without delay to prepare for tenantry.

"In behalf of the trustees, Joseph Sawyer."

This proposition the defendants accepted on the same day. Thereupon the amount payable under this agreement was averaged, and it was agreed that the defendants should give the plaintiffs therefor, which they consequently did, three bankable notes all dated April 1, 1871: one for $1167 on twelve months, which matured April 1, 1872, and was paid; one for $1166 on eighteen months, which matured January 1, 1873, and was paid; and third, the note in suit, which has never been paid. The defendants, on April 1, 1871, surrendered the premises to the plaintiffs, who entered into possession of the same, and shortly after leased them to another tenant, who was still occupying under his lease when the store was burned down and totally destroyed on November 9, 1872.

M. Storey, for the plaintiffs, was not called upon.

J. D. Long, (*S. B. Allen* with him,) for the defendants.

By the Court. The consideration of the notes given by the lessees was the acceptance by the lessors of the surrender of the lease. After this, the defendants had no interest in the estate, and their liability upon the notes was not affected by the condidition of the premises, or by the provisions of the lease which had ceased to exist. *Judgment for the plaintiffs affirmed.*

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JAMES HALL, JR., *vs.* ALPHEUS S. RIPLEY.
ALPHEUS S. RIPLEY *vs.* JAMES HALL, JR.

Suffolk. November 10. — 11, 1875. WELLS & ENDICOTT, JJ., absent.

In an action to recover for injuries caused by the collision of the plaintiff's carriage with that of the defendant, it is a question of fact for the jury whether the plaintiff, in the exercise of ordinary care, could, by stopping or turning out, have avoided the collision, and whether his failure to do so contributed to the injury.

In an action to recover for injuries caused by the collision of the plaintiff's carriage with that of the defendant, the fact that the plaintiff was at the time driving at a rate of speed prohibited by a city ordinance does not, as matter of law, defeat the action, if his own fault or negligence did not contribute to the injury; but it is competent evidence of negligence on his part to be submitted to the jury.

TWO ACTIONS OF TORT for injuries caused by the collision of the carriages of the respective parties on Beacon Street in Boston. At the trial in the Superior Court, before *Putnam*, J., it appeared from the evidence of both parties that the collision took place between eight and nine o'clock in the evening of July 7, 1873, and that the part of Beacon Street where the collision occurred was about fifty feet wide between the sidewalks.

The evidence offered by Hall tended to show that he was driving into the city on the right hand side of the road, within a few feet of the edgestone; that immediately before the collision he saw Ripley coming in the opposite direction, and driving in an irregular and careless manner; that at a moment before the collision Ripley deviated from his course, driving obliquely towards Hall; and that, though Hall uttered a cry of warning, and turned and drove as far to the right as was possible, the collision occurred by Ripley's driving out of his course unnecessarily. Hall also offered evidence tending to show that the street was free from passing vehicles; that the evening was clear, the moon was nearly full, and the light was such that objects could be easily seen at a considerable distance.

Ripley offered evidence tending to show that he was driving out from Boston, and that Hall, coming in an opposite direction, was driving at a high rate of speed, some fifteen or eighteen miles an hour, and racing with other parties, and that this was the cause, or one of the causes, of the collision.

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Hall admitted in testimony that he was driving at the rate of eight or nine miles an hour, and that when he saw Ripley at a distance of seventy-five or eighty feet and coming towards him, and apprehended a collision, he did not stop or turn to the left, but drove as near as he could to the right hand sidewalk, and when asked why he did not stop or turn to the left to avoid the danger, he answered, "I do not know why I did not." The ordinance of the city of Boston, which prohibited, under a penalty, driving at a rate faster than six miles an hour in any street of the city, was put in evidence.

Ripley testified that, in turning to the left to pass a hack driving in the same direction with him, he was unable to see Hall in season to avoid a collision; and his counsel requested the judge to rule "that if Hall saw Ripley before the collision, at the distance of seventy-five to eighty feet, coming towards him, and that Hall then saw there was danger of a collision if he kept on, it was his duty to stop or turn to the left to avoid a collision, and if he did not do so and collision or damage occurred in consequence, he cannot recover; but the judge refused so to rule, but instructed the jury that it was for them to say whether, in the exercise of ordinary care, Hall ought to have stopped or turned; and if, in their judgment, it was his duty to have done so, and by such stopping or turning he might have avoided the collision, he could not recover."

The counsel of Ripley also asked the judge to rule that if, at time of the collision, Hall was racing and driving at a rate of speed prohibited by the ordinance, he could not recover for injuries resulting from such collision. But the judge declined so to rule, and instructed the jury that such violation of the ordinance would not, of itself, prevent a recovery by Hall; that if it was one of the causes of the collision, it would prevent a recovery by Hall.

Proper instructions were given to the jury by the judge as to what constituted due care, and upon other points, to which no exceptions were taken. The jury returned a verdict for Hall in both the actions; and Ripley alleged exceptions to the refusal of the judge to give the foregoing instructions as requested, and to the instructions given in place thereof.

J. B. Richardson, for Ripley.

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A. Russ, for Hall, was not called upon.

By the Court. These cases were rightly submitted to the jury, and with apt and sufficient instructions. *Damon* v. *Scituate*, *ante*, 66, and cases cited. *Exceptions overruled.*

JOHN B. N. STULTS *vs.* MANUEL SILVA & another.

Suffolk. Nov. 11. — 12, 1875. WELLS, COLT & ENDICOTT, JJ., absent

A promissory note containing a provision that it shall be payable "in one and a half years, or sooner at the option of the mortgagor, from this date, with interest at the rate of seven per centum per annum during said term, and for such further time as said principal sum or any part thereof shall remain unpaid," is not negotiable, whether made by the mortgagor or by a third person.

The objection that a promissory note appears upon its face not to be negotiable, is open at the trial of an action thereon against the payee, in which the declaration sets out a copy of the note, and alleges that it was made payable to the payee or order, and indorsed by the payee to the plaintiff, and the answer denies all the allegations.

CONTRACT against Manuel Silva and Benjamin B. Newhall. The first count alleged that Silva made a promissory note, a copy of which was annexed, payable to Newhall or order, and that Newhall, "waiving demand and notice, indorsed the same to the plaintiff," and that Newhall owed the plaintiff the amount of the note and interest thereon. The copy of the note was as follows:

"$2268.00. Boston, February 1st, 1872. For value received, I promise to pay to Benjamin B. Newhall, or order, $2268.00 in one and a half years, or sooner at the option of the mortgagor, from this date, with interest to be paid semi-annually at the rate of seven per cent. per annum during said term, and for such further time as said principal sum or any part thereof shall remain unpaid. Manuel Silva.

"Secured by mortgage of real estate in Boston, Mass., stamped as required by U. S. Internal Revenue Laws, to be recorded in Suffolk Registry of Deeds."

[Indorsed.] "Waiving demand and notice. Benjamin B. Newhall."

The second count was upon another note differing only in amount from the preceding, and with a similar indorsement. An-

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swer, a general denial. The plaintiff discontinued as to Silva, on the ground of his discharge in bankruptcy; and a trial was had against Newhall in the Superior Court, before *Putnam*, J., who allowed a bill of exceptions in substance as follows:

The plaintiff proved the signatures of Silva as maker, and Newhall as indorser, as alleged; that the notes had not been paid; that he was the holder of the notes, and paid cash for them, and called upon Newhall, when they matured, to pay them, and he did pay the interest to August, 1873; and rested the case. The defendant contended and asked the judge to rule that the notes were not negotiable, and that this action could not be maintained against him as indorser; but the judge ruled otherwise. The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

L. W. Howes, for the defendant.

C. S. Lincoln, for the plaintiff. 1. The notes are negotiable. Even if it is assumed that the maker is the mortgagor, which is not a fact apparent on the face of the notes, the maker promises to pay in a time certain, or sooner, at the option of the mortgagor, that is, if he pleases. The promise to pay sooner if the maker pleases, is no promise, and is absurd and meaningless. No right is reserved thereby to pay before maturity. Being meaningless, the words should be entirely disregarded.

In *Way* v. *Smith*, 111 Mass. 523, there was a distinct agreement that the maker should have the right to pay the note before maturity, and that a lower rate of interest should be paid.

In *Hubbard* v. *Mosely*, 11 Gray, 170, it was distinctly agreed that on the payment to the original payee, the note should be given up to the maker. In the present case, the payment could be made only to the actual holder.

The phrase, "or sooner at the option of the mortgagor," is rendered still more absurd and ambiguous, by the word "mortgagor." There is nothing on the notes to show who the mortgagor is. *Cota* v. *Buck*, 7 Met. 588. *Stevens* v. *Blunt*, 7 Mass. 240. *Baxter* v. *Stewart*, 4 Sneed, (Tenn.) 213. *Washington County Ins. Co.* v. *Miller*, 26 Vt. 77.

2. The defence that the notes were not negotiable, was not open to the defendant on his answer. The answer is a general denial. There is no denial of liability on the allegations of the

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plaintiff. The allegations of the plaintiff were all proved, and no question of law was raised by the defendant, either in his answer, or on demurrer.

3. The defendant Newhall is estopped to deny the negotiability of the notes. He indorsed them, waiving demand and notice. His intent to hold himself liable as indorser is plainly to be inferred from these words, or they mean nothing. There was an implied promise by Newhall to pay the notes at maturity if the maker did not. The payment of the interest by Newhall supports the inference of a promise. If there were no such intent, Newhall would have indorsed the note "without recourse." *Leidy* v. *Tammany*, 9 Watts, 353. *Seymour* v. *Van Slyck*, 8 Wend. 403. *Jones* v. *Fales*, 4 Mass. 245. *Sanger* v. *Stimpson*, 8 Mass. 260. *Van Staphorst* v. *Pearce*, 4 Mass. 258.

GRAY, C. J. Each of the instruments in suit expresses a promise to pay a certain sum of money in a year and a half from its date, "or sooner at the option of the mortgagor," with interest at a certain rate "during said term." The principal sum is to be paid, either at the time specified, or at any earlier time that the mortgagor may elect. The interest is to be computed only until the note is paid. Both the time of payment of the principal, and the amount of interest, are uncertain, and depend upon the election of the mortgagor, who would seem, from the memorandum upon the note itself, to be the maker of the note. But if he were a third person, it would not aid the plaintiff. In either alternative, the contract, not being a promise to pay a fixed sum of money at a definite time, lacks the essential quality of a negotiable promissory note, and cannot be sued upon as such. *Way* v. *Smith*, 111 Mass. 523. *Hubbard* v. *Mosely*, 11 Gray, 170. Story on Notes, § 22.

The allegation in the declaration, that the payee indorsed each note to the plaintiff, is, with all other allegations in the declaration, denied by the answer, and is legally impossible upon its face. The objection to the plaintiff's right to maintain this action against the defendant was open at the trial, and, if judgment had been rendered on default, would have been open on writ of error. *Davis* v. *Travis*, 98 Mass. 222. *Hubbard* v. *Mosely*, 11 Gray, 170. *Haskell* v. *Lambert*, 16 Gray, 592. *Hollis* v. *Richardson*, 18 Gray, 392. *Exceptions sustained.*

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J. B. KINSMAN & others *vs.* CHARLES E. KERSHAW.

Suffolk. November 12, 1875. WELLS & ENDICOTT, JJ., absent.

A. sent B. to do work for C., and A.'s bookkeeper, after the completion of the work, made out, in accordance with his duty, the bill therefor upon one of A.'s printed bill-heads, which he placed in the hands of B., who demanded and received payment for the work from C. Upon the bill-head was printed in fine type, "All moneys to be paid to the treasurer and bills to be receipted by him." *Held*, in an action by A. against C. to recover for the work, that, in the absence of evidence that C. saw these words, there was evidence of payment to go to the jury.

CONTRACT on an account annexed to recover $34 for work done and materials furnished by the plaintiffs to the defendant. Answer, payment.

At the trial in the Superior Court, before *Allen*, J., the defendant testified that he called on John Babson, one of the plaintiffs, to ascertain the cost of some proposed work; that Babson said he would send a man to see what it would cost, and that afterwards John Q. Thayer called at the store of the defendant to estimate the probable cost; that the estimate made was satisfactory to the defendant, and that afterwards Thayer and another man came to his store; that Thayer superintended the work and acted as foreman, which work, with the materials used, formed the bill sued for; that some time afterwards Thayer came to his store with a bill made out upon one of the plaintiffs' bill-heads, and demanded payment of the defendant, giving as a reason for demanding payment that the company paid off their men that day; that the defendant found the bill correct and paid it. He then offered in evidence the receipted bill, which he testified was the bill Thayer had that day, and upon which he demanded payment; and it was admitted by the plaintiffs that the signature of Thayer was genuine.

The defendant then called John Babson, one of the plaintiffs, who testified substantially as follows: that he was one of the plaintiffs, and their secretary, treasurer and agent; that he knew Thayer, and at one time hired Thayer occasionally as a laborer to do work for the plaintiffs; that Thayer had no other connection with the plaintiffs, and had no authority to sell goods or to receive payment for them, and had never, while in the employ of

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the plaintiffs, sold goods or received payments for them; that he was paid by the day, two dollars a day when employed.

The defendant next called R. E. McDonald, formerly a bookkeeper of the plaintiffs, who testified substantially the same as the previous witness, as to the nature of Thayer's employment, and that he (McDonald) was in the employ of the plaintiffs as bookkeeper at that time; that it was a part of his work to make out bills; that Thayer came to him for payment for the labor which he had performed at the defendant's store, and that he, the witness, in accordance with his custom, gave the bill, which Thayer afterwards presented to the defendant, to Thayer, to take to the defendant, for the purpose of getting the defendant to approve the same, if correct, so that he, the witness, might know that Thayer had actually performed the labor charged for, before he paid Thayer; that Thayer did not return for his pay, and has not been seen since that day, and that the plaintiffs had not paid him (Thayer) for his work up to the time the witness left the plaintiffs' employ.

This was all the evidence bearing on the subject which was offered by either party. The bill produced by the defendant, receipted by Thayer, had at the top, in fine print, the following words: "All moneys to be paid to the treasurer, and bills to be receipted by him;" but there was no evidence that such printed lines were ever called to the attention of the defendant, or that he ever saw them. At the conclusion of the testimony, the plaintiffs asked the judge to instruct the jury that there was no evidence of payment, and to order a verdict for the plaintiffs. The judge refused to give this instruction, and ruled, in connection with other rulings, "that there was evidence of payment to go to the jury." The jury found for the defendant; and the plaintiffs alleged exceptions.

T. M. Babson, for the plaintiffs.

H. R. Brigham, for the defendant, was not called upon.

BY THE COURT. The bill made out upon one of the plaintiffs' printed bill-heads by their bookkeeper in accordance with his duty, and by him put in the hands of Thayer, and by Thayer shown to the defendant, was sufficient evidence of Thayer's authority to justify the defendant in paying him the amount of the bill, if the defendant acted in good faith, and without having ob-

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served the words in fine print at the top of the bill requiring all moneys to be paid to the plaintiffs' treasurer. The case was rightly submitted to the jury. *Exceptions overruled.*

WILLIAM G. HARRIS & others *vs.* JOHN DOHERTY & trustee.

Suffolk. Nov. 12. — 13, 1875. WELLS & ENDICOTT, JJ., absent.

Under the Gen. Sts. c. 142, § 5, providing that trustee processes shall be served on the defendant and each of the trustees in the manner prescribed for the service of an original summons without an attachment, and c. 123, § 22, providing that in any action brought against a city or town the writ shall be served thirty days at least before the return day, a city cannot be summoned as trustee less than thirty days before the return day.

Where an action is begun by trustee process and the writ is not legally served upon the trustee, the plaintiff may, under the Gen. Sts. c. 142, § 7, proceed with the suit against the principal defendant, if he has been legally served.

TRUSTEE PROCESS. Writ dated December 15, 1874, and returnable to January term 1875 of the Superior Court, the return day being January 5. The city of Boston was summoned as trustee. It appeared by the officer's return that service was made on the trustee on December 16, 1874, and on the principal defendant on December 21, 1874.

At January term 1875 of the Superior Court the trustee entered a special appearance and prayed for a discharge on the ground that no legal service had been made upon it. The court ordered the trustee to be discharged, and gave judgment for the plaintiff for the amount claimed and costs. From the judgment discharging the trustee the plaintiff appealed.

A. H. Briggs, for the plaintiff.

C. F. Kittredge, for the trustee.

GRAY, C. J. By the Gen. Sts. *c.* 123, § 21, original writs issuing from this court or the Superior Court must be served fourteen days at least, and from a police court or justice of the peace seven days at least, before the return day; and by § 22, in any action brought against a city or town, or certain other corporations, the writ must be served thirty days at least before the return day. By *c.* 142, § 5, trustee processes must be "served

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on the defendant and each of the trustees in the manner prescribed for the service of an original summons without an attachment." As no time is otherwise prescribed for the service of trustee processes, "the manner" evidently includes the time, as well as the form, of service. This writ, therefore, having been served upon the city of Boston, as trustee of the principal defendant, less than thirty days before the return day, was not legally served upon the city. *Stimpson* v. *Malden*, 109 Mass. 313.

The provision of *c.* 123, § 19, that original writs issuing from this court or the Superior Court, "if required to be served fourteen days before the return day, shall be made returnable at the court next to be held after the expiration of fourteen days from the date of the writ; and if required to be served thirty days before the return day, shall be made returnable to the court next to be held after the expiration of thirty days from the date of the writ," creates no difficulty which may not be avoided by the plaintiff in any action; for if a city, town or other corporation named in § 22, is summoned as trustee, so that the writ cannot be made returnable within thirty days, it may be served on the principal defendant, as well as on another trustee, who is not entitled to more than fourteen days' notice, fourteen days before the return day. *c.* 142, § 6.

The writ in this case not having been legally served upon the trustee, the Superior Court rightly discharged him, and allowed the action to proceed against the defendant, who had been legally served. *c.* 142, § 7. *Belknap* v. *Gibbens*, 13 Met. 471.

Judgment affirmed.

CHARLES H. STUART & others *vs.* JABEZ H. SEARS.

Suffolk. November 12. — 15, 1875. WELLS & ENDICOTT, JJ., absent.

If in a settlement of mutual accounts one party thereto allows, without being induced by fraud, a certain sum by way of compromise of a doubtful claim, he cannot recover it back; but if he pays it relying upon erroneous vouchers produced by the other party at the time of the settlement, he may, even if there was no fraud, recover it back as money paid by mistake.

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CONTRACT by Charles H. Stuart, John H. Snow and Ether S. Foss, partners under the firm name of Stuart, Snow & Foss, to recover $1000 for work done and materials furnished by the plaintiffs for the defendant. The declaration also contained a count for the same amount, as money had and received by the defendant to the plaintiffs' use, and a count setting forth substantially the facts which appear in the evidence introduced by the plaintiffs.

At the trial in the Superior Court, before *Wilkinson*, J., the evidence on the part of the plaintiffs tended to prove that the defendant was liable to pay, and did pay, to the plaintiffs large sums of money, in many items, and at different times, due to the plaintiffs upon different contracts, and that an action was brought by the plaintiffs against the defendant to recover the balance due, and that, finally, on September 19, 1874, a final settlement was made between the plaintiffs and defendant, whereby the action was discontinued and a voucher given by the plaintiffs to the defendant, showing a total debit account to the plaintiffs of $63,520.29, and a credit account to the defendant containing the following item: "By cash sundry times, $46,700.00," and the following words, dated Boston, September 19, 1874, and signed by the plaintiffs: "The accounts of Jabez H. Sears are settled in full to this date."

There was in the account of the defendant an item of cash paid under date of March 13, 1874, $1000; and one other similar item of $1000 under date of May 13, 1874. On the plaintiffs' book there was a credit of $1000 under date of May 13, 1874, but no credit of $1000 under date of March 13, 1874. In other respects the accounts of the parties agreed. This discrepancy in the accounts was talked over by the parties before the settlement and efforts made to discover which was correct, and the settlement was delayed a week or more for that purpose.

As evidence of said payment, at the time of settlement the defendant produced a check for $1000, given by him to the plaintiffs, and taken up by him, dated March 13, 1874, and a receipt signed by the plaintiffs for $1000, "Mason work and materials," dated March 13, 1874.

The plaintiffs testified that, relying upon the accuracy of the date of the check and receipt they allowed in the settlement the

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$1000 charged in defendant's account under date of March 13, 1874. The plaintiffs then offered evidence tending to show that the true date of the check and receipt was May 13, 1874; that the check was presented to the bank May 15, 1874; that the receipt and check were intended for the payment made by the defendant May 13, 1874, and that the allowance of it, March 13, 1874, was a mistake, and that thereby they had given the defendant credit for $1000 more than he had in fact paid.

The defendant asked the judge to instruct the jury that, if at the time of said settlement the plaintiffs on an examination of the evidence, in the absence of fraud on the part of the defendant, decided to allow said disputed item of $1000 and did allow it, and said settlement was effected accordingly, this action cannot be maintained.

The judge declined so to instruct the jury, but did instruct them that if there was a doubtful claim settled by way of compromise, without fraud, the plaintiffs could not recover; but if the defendant produced, at the time of settlement, either by fraud or mistake, the check and receipt of March 13, 1874, as evidence of a payment of $1000 at that time, when in fact they were intended to cover the payment in May, and the plaintiffs were misled and induced thereby, erroneously, to allow the charge of $1000, under date of March 13, 1874, when no such payment had been made, the plaintiffs were entitled to recover the same back.

The jury returned a verdict for the plaintiffs; and the defendant alleged exceptions to the above refusal and ruling.

B. Dean, for the defendant.

W. H. Towne, for the plaintiffs.

GRAY, C. J. The instructions to the jury were in exact accordance with the well settled law. If the sum now sued for was allowed in the settlement between the parties, without fraud, by way of compromise of a doubtful claim, it could not be recovered back; but if it was paid by the plaintiffs, relying upon erroneous vouchers produced by the defendant at the time of the settlement, it might, even if there was no fraud, be recovered back as money paid by mistake. *Riggs* v. *Hawley*, 116 Mass. 596, 598. *Merchants' National Bank* v. *National Eagle Bank*, 101 Mass. 281, 285. *Paige* v. *Sherman*, 6 Gray, 511. *Union Bank* v. *Bank of United States*, 3 Mass. 74. *Exceptions overruled.*

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ALFRED DANKER *vs.* JAMES S. ATWOOD.

Suffolk. November 12. — 15, 1875. WELLS & ENDICOTT, JJ., absent.

A bond purporting in its body to be executed by J. S., "as principal and —— —— as sureties," and signed by the principal and A., is good against A. as surety, if duly executed by the principal, and it does not appear that A., at the time of execut ng it, understood that it was to be executed by any other person as surety.

The surety upon a bail bond is liable in *scire facias* thereon, if the writ upon which the principal was arrested is identified by a date, the court, the full name of the plaintiff, and the surname of the defendant, although his Christian name, as expressed in the bond, was not inserted in the writ.

SCIRE FACIAS against the defendant as surety upon the following bond:

"Know all men by these presents: That we, Samuel Snow, of Bath, State of Maine, as principal, and —— —— as sureties, are holden, and stand firmly bound and obliged unto W. H. Warren, Jr., one of the Constables of the city of Boston, in the sum of three hundred dollars, to be paid unto said W. H. Warren, Jr., his executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

"Witness our hands and seals. Dated the third day of February, in the year of our Lord one thousand eight hundred and seventy-four.

"The condition of this obligation is such, that whereas the body of the above bounden Samuel Snow is taken by force of a writ or process, bearing date February third, A. D. 1874, wherein Alfred Danker, plaintiff, and said Samuel Snow is defendant, returnable before our Justices of the Municipal Court of the city of Boston, next to be holden at said Boston, within and for said county, for civil business, on Saturday, the fourteenth day of February, A. D. 1874, at nine of the clock in the forenoon, to answer unto said plaintiff in an action of tort, commenced by said plaintiff to be heard and tried at said court, as by the return of said writ or process will appear.

"Now therefore, if the above bounden Samuel Snow shall appear before said justices of said court, to be holden as aforesaid, to answer unto said plaintiff in said action or process, and shall abide the final judgment thereon, and shall not avoid, then the

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above written obligation shall be null and void, otherwise it shall be and remain in full force and virtue.

"Samuel Snow. (Seal.)
"James S. Atwood. (Seal.)"

The case was submitted to the Superior Court, and after judgment for the plaintiff for $198.15, to this court on appeal, upon agreed facts in substance as follows:

On February 3, 1874, the plaintiff sued out a writ from the Municipal Court of the city of Boston, said writ being returnable to said court February 14, 1874, and the defendant in said writ was described as "Mr. Snow, chief mate of ship Emma." By virtue of said writ the said Snow was arrested on mesne process, and signed and affixed his seal as principal to the said bail bond, which bond so signed was, by the officer, at the request of Snow, and upon his representations that the defendant Atwood would become surety for him thereon, sent to the store of Atwood, and was returned soon after with the signature of the defendant upon it, and thereupon the officer released Snow from arrest. The obligee in the bond is the officer who made the arrest, and no alteration was made in the bond after the defendant signed it. The plaintiff recovered judgment March 2, 1874, against "Mr. Snow, chief mate of ship Emma," for $150 damages, and $34.04 costs of suit, and on this judgment execution issued from said court March 13, 1874, against "—— Snow, chief mate of ship Emma." The execution was returned to the court by the officer, in due season, wholly unsatisfied, and with a proper return thereon. On July 14, 1874, the plaintiff brought the present action against Atwood, in said Municipal Court. The writ recited the judgment obtained against —— Snow on March 2, 1874, and that "James S. Atwood of said Boston, at Boston aforesaid on the third day of February, A. D. 1874, became bail and surety for the said —— Snow," and proceeded in the usual form of a *scire facias*.

J. M. Browne, for the plaintiff.

T. M. Babson, for the defendant.

GRAY, C. J. The bond containing the name of Samuel Snow as principal, followed by a blank before the words "as sureties," and signed by Samuel Snow and James S. Atwood, shows upon its face that Atwood must have signed as surety. *Smith* v. *Crooker*, 5 Mass. 538. *Burns* v. *Lynde*, 6 Allen, 305, 308, 310.

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United States v. *Nelson*, 2 Brock. 64, 70. *Ex parte Fulton*, 7 Cowen, 484. *Stone* v. *Wilson*, 4 McCord, 203. The bond was duly executed by the principal, and it does not appear that Atwood, at the time of executing it, understood that it was to be executed by any other person as surety. *Cutter* v. *Whittemore*, 10 Mass. 442. *Herrick* v. *Johnson*, 11 Met. 26. *Russell* v. *Annable*, 109 Mass. 72. The writ upon which the principal had been arrested is sufficiently identified by the date, the court, the full name of the plaintiff, and the surname of the defendant, although his Christian name, as expressed in the bond, was not inserted in the writ. Atwood was therefore rightly held liable in the present action. *Judgment affirmed.*

A. A. COOKE & another *vs.* G. W. HALLETT & another & trustee.

Suffolk. November 15, 1874. WELLS & ENDICOTT, JJ., absent.

A. delivered to B. a certificate of stock in a corporation as collateral security for a debt. B. thereupon surrendered the certificate to the corporation, and took out a new certificate in his own name as trustee. A. paid the debt, and B. delivered the certificate to A. and gave him a power of attorney, irrevocable in its terms, but not naming any attorney, to transfer the stock. After this, and before the stock was transferred on the books of the corporation, B. was summoned as trustee of A. in a process of foreign attachment. *Held*, that he could not be charged.

TRUSTEE PROCESS. Julius A. Palmer, summoned as trustee on January 31, 1874, answered, denying that, at the time of service upon him, he had in his hands and possession any goods, effects or credits of the principal defendants. The plaintiffs thereupon filed interrogatories to the trustee, and the material portions of his answers thereto were as follows:

On November 6, 1873, Charles W. Sweetland, one of the principal defendants, borrowed $500 of Palmer, giving his note therefor, payable in thirty days, and at the same time placed in Palmer's hands, as collateral security for the payment of said note, certificates of 254 shares of the capital stock of the Star Too. Company, a corporation existing under the laws of the State of Connecticut. These shares stood in the names of I. G. Gates

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and W. L. Hayden, and Palmer delivered up the certificates to the company, and took out an absolute certificate therefor, in the name of "Julius A. Palmer, trustee," and held the same until December 6, 1873, when Sweetland paid his note, and Palmer surrendered to Sweetland the said certificate, and gave him at the same time a power of attorney, irrevocable in its terms, but not naming any attorney, to transfer the stock.

On December 31, 1873, "Julius A. Palmer, trustee," transferred on the books of said company 100 shares of said stock to B. D. Washburn, and on February 9, 1874, 70 of said shares to N. B. Stevens, and 84 of said shares to B. D. Washburn. Said transfers were made under the said power of attorney, without the knowledge or collusion of Palmer. No notice was given to the company by Palmer of his surrender to Sweetland of the certificate of stock standing in Palmer's name, nor of his giving Sweetland the power of attorney.

The following by-law of the Star Tool Company was in force during all the time covered by the transfers hereinbefore named: "Shares of the capital stock may be transferred by the holder thereof, or by his attorney or legal representative, only upon the transfer books of the corporation. In every such transfer, the certificate previously issued shall be delivered up and affixed to the original certificate book in the place from whence taken, and a new certificate or certificates shall thereupon be issued, and no transfer shall be complete and valid until the new certificate is thus issued."

In the Superior Court the principal defendants were defaulted, and the plaintiffs moved that the trustee be charged on his answers. *Wilkinson*, J., ordered that the trustee be discharged, and the plaintiffs appealed.

H. Baylies, for the plaintiffs.

G. H. Poor, for the trustee, was not called upon.

BY THE COURT. The trustee took and held the shares as collateral security only for the debt due him from the principal defendant. After he had been paid that debt, and had delivered up the shares to the defendant, he had no goods, effects or credits of the defendant in his hands.

Judgment discharging trustee affirmed.

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ANDREW CARLAND *vs.* GILBERT F. YOUNG.

Suffolk. November 15, 1875. WELLS & ENDICOTT, JJ., absent.

In an action to recover for personal injuries sustained by a man by being struck by a wagon while crossing a street in a city, at eleven o'clock in the forenoon, it appeared that the street was sixteen feet wide, and that a person could see the whole length of the street. The plaintiff testified that his eyesight was good; that he looked and did not see the wagon, or hear it, until he was struck. A witness for the plaintiff testified that he was about twenty-five feet from the plaintiff, heard some one halloo and the rattle of a wagon, and turned and saw the wagon hit the plaintiff, who was then but a few steps in the crossing. The defendant testified that he saw the plaintiff and hallooed to him before he left the sidewalk, and when he was about fifteen feet from him; that the plaintiff turned and looked around, and undertook to run across. *Held*, that whether the plaintiff was in the exercise of due care was a question of fact for the jury.

TORT for injuries sustained by being run over by the defendant's milk wagon on a street in Boston.

At the trial in the Superior Court, before *Wilkinson*, J., it appeared that the plaintiff had come down Causeway Street, and turned to the right into Merrimac Street, and was crossing Prospect Street, when the defendant, driving down Prospect Street, ran upon him and injured him.

The plaintiff testified that he did not see nor hear the defendant or his wagon until he was struck; that he looked and did not see the wagon; that he could not tell whether the horse or wagon hit him, but the defendant told him it was the wagon. He also introduced one witness, who testified that he was standing in Merrimac Street or Square about twenty-five feet from the plaintiff, and heard some one halloo and the rattle of a wagon, and on turning round saw the wagon strike the plaintiff. The plaintiff had then got but a few steps in the crossing. The witness said he was not a judge of speed, but thought the defendant was driving at the rate of six to eight miles an hour. The plaintiff called no other witness who saw the accident.

The defendant testified that he saw the plaintiff and hallooed to him before he left the sidewalk, and when he was about fifteen feet from him; that the plaintiff turned and looked around and undertook to run across; that he had his horse well in hand, one rein in each hand, and that he was not going over seven miles an hour, and that, as he neared the plaintiff, he, the defendant

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swung his horse to the right, away from the plaintiff, but that the plaintiff persisted in crossing.

The jury viewed the premises. At the corner from which the plaintiff undertook to cross, one can see up the whole length of Prospect Street. The grade is a little descending. At the crossing, the street is sixteen feet between the edgestones. The accident occurred on July 6, about eleven o'clock in the forenoon. The plaintiff testified that his eyesight was good, and that at the time of the accident he was "smart as anybody." At the trial he was somewhat deaf. There was no other evidence as to the manner in which the accident occurred.

After the testimony was closed, the defendant requested the judge to instruct the jury that the plaintiff had not shown due care on his part; but that on the contrary, taking all the evidence in the case, it appeared that due care on the plaintiff's part was wanting. The judge declined so to rule, and left the case to the jury under instructions not objected to, if the case was rightfully left to the jury. The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

S. J. Thomas, for the defendant, cited *French* v. *Taunton Branch Railroad*, 116 Mass. 537; *Pennsylvania Railroad* v. *Weber*, 76 Penn. St. 157.

L. C. Wade, for the plaintiff, was not called upon.

BY THE COURT. The case, as stated in the bill of exceptions, presented a pure question of fact for the jury, and was rightly submitted to them. *Exceptions overruled.*

PHILIP E. FIELD *vs.* JOHN THOMPSON.

Suffolk. November 15. — 16, 1875. WELLS & ENDICOTT, JJ., absent.

In an action to recover the price of goods sold and delivered, the only issue was whether the delivery of the goods, which was made to a third party, was upon the defendant's order and credit. The plaintiff offered to show by entries in his books of account that the articles were charged to the defendant, and credit given alone to him. The judge excluded the evidence for that purpose, and ruled that "the entry in the book might be regarded as a memorandum made by the plaintiff at the time, and, as such, entitled to some weight in confirmation of the recollection and evidence of the plaintiff," upon the issue. *Held*, that the first ruling excluding the evidence was correct, and that the second ruling was erroneous.

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CONTRACT on an account annexed to recover $169.85, the price of certain articles furnished for the burial of the wife of one Drinkwater, who was the sister of the defendant's wife.

At the trial in the Superior Court, before *Pitman*, J., without a jury, the only issue was upon whose order and credit the articles were delivered.

The plaintiff offered evidence tending to show that the defendant, Drinkwater being present, verbally ordered the articles, and directed the plaintiff to charge them to him; that they were subsequently delivered at the house where both the defendant and Drinkwater lived, and were used in the burial.

The plaintiff further offered to show by his book of account that the articles were charged to the defendant, and credit given alone to him; but on objection by the defendant, the judge excluded the book for that purpose; and ruled that the entry in the book might be regarded as a memorandum made by the plaintiff at the time, and, as such, entitled to some weight in confirmation of the recollection and evidence of the plaintiff, with reference to whether or not credit was given to the defendant, and the goods delivered on his order.

There was no evidence that the defendant ever saw the entry in the book; and he offered evidence tending to show that he never ordered the goods, and never directed that they should be charged to him, and never agreed to pay therefor. It was admitted that none of the articles were delivered to the defendant personally.

The judge found for the plaintiff; and the defendant alleged exceptions to the ruling of the judge, admitting the book in evidence.

J. L. Eldridge, for the defendant.

C. H. Fleming, for the plaintiff.

GRAY, C. J. The bill of exceptions shows that the delivery of the articles in question was not disputed, and that the only real issue in the case was upon whose order and credit they were delivered. The entries in the plaintiff's book of account were not admissible on that issue; they were not in the nature of a certificate required by law or usage, but were mere private memoranda; and the first ruling, excluding the book, was correct. ***Somers* v. *Wright*, 114 Mass. 171.**

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The entries might doubtless be shown to the witness to aid his recollection; and if they did not appear to have been admitted for any other purpose, the exception to their admission could not be sustained. *Dugan* v. *Mahoney*, 11 Allen, 572. *Cobb* v. *Boston*, 109 Mass. 438.

But the final ruling of the learned judge, as stated in the bill of exceptions allowed by him, went beyond this. It was, "that the entry in the book might be regarded as a memorandum made by the plaintiff at the time, and, as such, entitled to some weight in confirmation of the recollection and evidence of the plaintiff" upon the question at issue between the parties. This ruling was inconsistent with the first one, and allowed to these entries a weight as evidence, in corroboration of the plaintiff's testimony, to which they were not legally entitled. *Townsend Bank* v. *Whitney*, 3 Allen, 454. *Maine* v. *Harper*, 4 Allen, 115. *Bentley* v. *Ward*, 116 Mass. 333. *Prew* v. *Donahue*, 118 Mass. 438.

Exceptions sustained.

CHARLES T. HAMBLEN & another *vs.* THOMAS RATIGAN.

Suffolk. November 10. — 16, 1875. WELLS & ENDICOTT, JJ., absent.

The creditors of A. and B. by a composition deed agreed to accept from A. and B. "ten per cent. of the amounts due us and each of us from said A. and said A. and B. in full settlement and discharge of our debts against them, said ten per cent. to be paid within thirty days." The plaintiff, one of A.'s creditors who joined in the deed, held a note and account against him, which were then due. He also held another note, which would not become due until after the expiration of said thirty days, on which A.'s name appeared as indorser. *Held*, that this last note was not included in the composition deed.

CONTRACT upon a promissory note, dated February 2, 1874, signed by one Travers, and payable three months after date to the order of the defendant, who indorsed the same to the plaintiffs. Writ dated June 10, 1874. The case was submitted to the Superior Court, and after judgment for the defendant, to this court, on appeal, on an agreed statement of facts in substance as follows:

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Payment of the note was duly demanded of said Travers, the maker, who neglected to pay the same, and due notice of its non-payment was given to the defendant.

On February 24, 1874, before the said note became due, the plaintiffs joined with other creditors in the execution of a composition deed, of which the following is a copy:

"We, the undersigned, creditors of George D. Clement and Thomas Ratigan, both of Boston, in consideration of one dollar to each of us paid, do hereby agree to accept from said Clement and Ratigan a sum equal to ten per cent. of the amounts due us and each of us from said Ratigan, and said Clement and Ratigan, in full settlement and discharge of our debts against them as above, said ten per cent. to be paid within thirty days."

At the time of signing the composition deed the plaintiffs, in addition to the note now in suit, held another note for $100, signed by the defendant, which was then due and payable, and there was also due the plaintiffs the sum of $70 on open account for goods sold the defendant. In accordance with the terms of the agreement in the composition deed the plaintiffs received a dividend of $17, being ten per cent. of the amount due on the open account and on the note then due and payable, and no part of the note now in suit has ever been paid.

If, on these facts, the plaintiffs were entitled to recover at all, judgment was to be entered for them for $100 and interest from May 2, 1874, or for ten per cent. of that amount, as the court should find that the note declared on was covered by the composition deed or not.

W. S. Hall, for the plaintiffs.

J. D. Long, for the defendant.

DEVENS, J. By the composition deed the creditors of Ratigan agreed to accept ten per cent. of the amounts due them in settlement and full discharge of their debts, and at that time the plaintiffs held a note and account against the defendant both of which were due. This deed was dated February 24, 1874, and the ten per cent. was to be paid within thirty days. There was a contingency upon which there might become due from Ratigan to the plaintiffs a certain other sum, if Travers should fail to pay his note at maturity, and Ratigan should be properly notified thereof. The defendant contends that upon payment of ten per cent. of

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amounts due, he was entitled to be discharged from all debts, whether due or not. Whatever might have been the effect of the deed upon debts, the liability for which was fixed, the character and language of the deed does not indicate that it was intended to be a relinquishment of all liabilities by reason of which the defendant might afterwards upon the occurrence of certain events become chargeable as a debtor. While such a contingent demand might undoubtedly have been released if the parties had so intended, yet it should appear that they had it in view at the time of executing the deed. *Pierce* v. *Parker*, 4 Met. 80, 89. Here everything points to the opposite conclusion. Before it could be determined whether the defendant would become liable to pay this note, the composition deed would by its terms have been fully executed. There were two claims to which it strictly applied; and the subsequent conduct of the parties, who made no provision for any dividend upon this, tends to show that it was not understood upon either side that this claim was released.

Judgment for the plaintiffs.

COMMONWEALTH, by Insurance Commissioner, *vs.* HIDE AND LEATHER INSURANCE COMPANY. Columbian Book Company, petitioner.

Suffolk. November 16. — 17, 1875. WELLS & COLT, JJ., absent.

After receivers of an insurance company, established by the laws of this Commonwealth, have been appointed, and an injunction issued, under the Gen. Sts. c. 58, § 6, a petition in equity cannot be maintained by a creditor of a creditor of the company to reach, and apply to the payment of the petitioner's claim, the funds belonging to the creditor of the company in the hands of the receivers.

PETITION IN EQUITY, filed May 2, 1874, alleging that the plaintiff is a corporation established under the laws of Connecticut, and doing business in that state; that J. A. & E. S. De Golyer, copartners, doing business under the name of the Union Publishing Company in Chicago, in the State of Illinois, are indebted to the plaintiff in the sum of $215, for goods sold and delivered to them by the plaintiff; that the Hide & Leather In-

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surance Company is insolvent, and that James C. Davis is the receiver thereof, by appointment of this court; that the said Hide & Leather Insurance Company was indebted to J. A. & E S. De Golyer at the time of the appointment of the receiver, and that the receiver has in his hands, goods, effects and credits of J. A. & E. S. De Golyer.

The prayer of the petition was that the court would order the receiver to pay from the funds in his hands, belonging to J. A. & E. S. De Golyer, a sum sufficient to satisfy the claim of the petitioner, if there was so much in his hands after deducting his costs.

The answer of the receiver admitted that there was in his hands, at the time of service upon him, the sum of $225 of dividends declared upon a claim duly proved by J. A. & E. S. De Golyer against the Hide & Leather Insurance Company; and alleged that before the filing of the petition E. S. De Golyer had been duly adjudicated to be a bankrupt, and that on February 10, 1874, all his property was duly assigned to J. Edwards Fay, of Chicago, who was appointed his assignee; and that Fay had, before the filing of the petition, demanded of him the said dividends; and that after the filing of this petition, Fay had filed with him a paper dated August 27, 1874, and purporting to be signed by J. A. De Golyer, assigning to said Fay, as such assignee, all the interest of J. A. De Golyer in said dividends.

At the hearing, before *Endicott*, J., the above facts alleged in the answer were admitted by the petitioner.

The judge ruled that the funds in the hands of the receiver could not be reached by this method, and ordered the petition to be dismissed; and the petitioner appealed.

G. W. Morse & Z. S. Arnold, for the petitioner.

J. C. Davis, *contra*.

GRAY, C. J. In *Columbian Book Company* v. *De Golyer*, 115 Mass. 67, it was decided that the receivers of this insurance company were not chargeable as trustees in an action at law against one of its creditors; and that the question, whether the plaintiff in that action had any claim upon the property in the custody of the receivers, could only be tried on a petition upon the equity side of the court in the cause in which the receivers were appointed.

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Such a petition has now been presented, and, upon consideration, we are of opinion that the reasons are quite as strong against granting the prayer thereof. The property of the corporation is entrusted to the receivers by the authority of the law, for the purpose of distribution among the creditors of the corporation, not among the creditors of those creditors. To undertake to determine, as incidental to the administration of the estate of the corporation, the validity and equity of the claims of every creditor of a creditor of the corporation, would unreasonably embarrass and delay the distribution of the estate and the settlement of the accounts of the receivers.

In ascertaining the amount due to any creditor of the corporation, the court will indeed follow, as far as practicable, the rule established by statute in proceedings in insolvency or bankruptcy. *Commonwealth* v. *Shoe & Leather Dealers' Ins. Co.* 112 Mass. 131. But no statute provides for the intervention of creditors of creditors, either in ordinary proceedings in insolvency or bankruptcy, or in proceedings in equity for the sequestration of property and the appointment of receivers. The provision of the Gen. Sts. *c.* 142, § 23, allowing assignees of an insolvent debtor to be summoned as his trustees in a common law process of foreign attachment, does not (as has already been decided in the case of this petitioner in 115 Mass. 67) apply to receivers, and cannot be extended by analogy. The clause of the Gen. Sts. *c.* 113, § 2, which gives this court jurisdiction in equity of a bill by a creditor to reach and apply, in payment of his debt, property or rights of his debtor, which cannot be come at to be attached or taken on execution in a suit at law against the debtor, does not extend to property which is not in the control of the debtor, nor put by him into the custody of a third person, but which is in the hands of officers of the law for distribution under proceedings provided by statute for that purpose.

Order affirmed.

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WILLIAM A. WAIT, executor, *vs.* SARAH S. DEMERITT.

Suffolk. November 16. — 17, 1875. WELLS & COLT, JJ., absent.

The "attested copy" of the reasons of appeal filed in the probate office, which is required by the Gen. Sts. c. 117, § 10, to be served on the adverse party, must be attested by the register of probate; and the service of a copy, attested by the attorney of the appellant, is not a compliance with the statute.

APPEAL from a decree of the Probate Court for the county of Suffolk, allowing a certain instrument as the last will and testament of Sarah S. Ireland, deceased. The decree of the Probate Court was entered December 16, 1874; and within thirty days thereafter the appellant, who was one of the heirs at law of the testatrix, filed her claim and reasons of appeal in the probate office, and duly entered in this court attested copies of the papers on file in the probate office. The only service of the reasons of appeal upon the adverse party was by a copy thereof, attested by the attorney of record of the appellant, in the Probate Court, delivered more than fourteen days before the entry of the appeal in this court to the attorney in fact, and of record in the Probate Court, of the appellee. The receipt of the copies on the day of service was admitted by the counsel for the appellee.

On motion of the appellee, upon these facts, *Devens*, J., ruled that the service of the reasons of appeal upon the adverse party was insufficient in law, and dismissed the appeal. The appellant alleged exceptions.

A. A. Ranney, for the appellant.

H. G. Hutchins, for the appellee.

GRAY, C. J. The "attested copy" of the reasons of appeal filed in the probate office, which is required by the Gen. Sts. *c.* 117, § 10, to be served on the adverse party, must be attested by the register, who is the legal custodian of the original paper, and whose official attestation is of itself a sufficient verification of the copy. The service of a copy attested by the attorney of the appellant was not a compliance with the statute.

The St. of 1874, *c.* 187, authorizes further service of any writ, process or order, the first service of which is defective or insufficient, to be directed by the court, only "upon the motion of the plaintiff or petitioner." The bill of exceptions does not show that

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any motion for further service was made. We need not therefore consider whether this statute extends to probate causes.

Exceptions overruled.

HENRY E. FICKETT *vs.* JOSEPH J. DURHAM.

Suffolk. November 18.—19, 1875. WELLS & COLT, JJ., absent.

The St. of 1875, c. 68, providing that "whenever any defendant in a civil action dissolves an attachment made in said suit, by giving bond as provided by the statutes of this Commonwealth, and has already been or afterwards is adjudged a bankrupt," the court may enter a special judgment, applies only to cases where bonds to dissolve attachments are given after the statute went into operation.

MORTON, J. The only question presented in this case is whether the plaintiff is entitled to a special judgment "to enable him to proceed against the sureties upon the bond given to dissolve the attachment," under the St. of 1875, *c.* 68.

There is no controversy as to the facts. The plaintiff's writ is dated October 1, 1872. An attachment of the defendant's property was made thereon, which was dissolved by a bond given on November 21, 1872. On February 6, 1875, the defendant was adjudged a bankrupt and has since obtained his discharge.

The attachment, having been made more than four months before the filing of the petition, would have continued a subsisting lien notwithstanding the bankruptcy, if it had not been dissolved by the acts of the parties, and the plaintiff would have been entitled to a qualified judgment to enforce it. But the attachment having been dissolved by a bond given under our statutes, the plaintiff is not entitled to a special judgment to enable him to hold the sureties upon the bond, unless this right is conferred by the St. of 1875. *Carpenter* v. *Turrell*, 100 Mass. 450. *Braley* v. *Boomer*, 116 Mass. 527. The case therefore turns upon the question whether the St. of 1875 is retroactive in its operation, so as to apply to cases in which bonds to dissolve attachments had been given before the statute took effect.

It is the settled rule in the interpretation of statutes that they are to be construed as prospective in their operation, and are not to be held to affect the rights or enlarge the liabilities of the sub-

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ject as to past contracts or transactions unless such intention is unequivocally expressed or clearly to be implied from their provisions. *Gerry* v. *Stoneham*, 1 Allen, 319. *Garfield* v. *Bemis*, 2 Allen, 445. *North Bridgewater Bank* v. *Copeland*, 7 Allen, 139. In the statute we are considering, there is nothing to indicate that the Legislature intended it to have a retrospective operation. On the contrary it is clear that it was intended to apply only to cases where bonds to dissolve attachments were given after it went into operation. The statute provides that "whenever any defendant in a civil action dissolves an attachment made in said suit, by giving bond as provided by the statutes of this Commonwealth, and has already been or afterwards is adjudged a bankrupt," the court may enter a special judgment. This language, by its natural import, applies to the dissolution of attachments by giving bonds in the future, and not to cases where bonds have already been given. In accordance with a practice in framing statutes, introduced in the revision of 1860, and which has since become nearly uniform, the present tense, "dissolves," is used instead of the future, but the meaning is the same as if the future tense had been used and the provision had read that "whenever any defendant in a civil action shall dissolve an attachment therein by giving bond," the court may enter a special judgment. A significant indication that this was the intention of the Legislature is also found in the second section of the act, which provides that "no bond shall hereafter be given to dissolve an attachment in a civil action, unless it contains, in addition to the conditions now required by law, a further condition obliging the sureties to pay to the plaintiff, within thirty days after the entry of any special judgment in accordance with the preceding section, the sum, if any, for which said judgment shall be entered." This implies that the understanding of the Legislature was that the act imposed upon the sureties a new condition and an enlarged liability, which could only properly be enforced against those who, by the terms of their contract, had assumed such liability.

Without considering the point taken by the defendant, that the statute, if it was retrospective, would be unconstitutional, we are of opinion that it was not intended to, and does not by a fair construction of its terms, apply to cases where attachments have been dissolved by bonds given before it took effect, and therefore

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that the plaintiff in the case at bar is not entitled to a special judgment, as ordered by the Superior Court.

Exceptions sustained.

D. C. Linscott, for the defendant.
E. Merwin, for the plaintiff.

SARAH W. BOARDMAN *vs.* ABRAHAM JACKSON & others.

Suffolk. Nov. 18. — 19, 1875. WELLS & COLT, JJ., absent.

If a person forges a deed of land to himself without the knowledge or consent of the owner, and fraudulently procures an acknowledgment of the deed by some other person, and then leases and afterwards sells the land, the owner has a plain, adequate and complete remedy at law, and cannot maintain a bill in equity against the person executing the deed, the assignee of the lessee, and the purchaser, to cancel the deeds and lease.

BILL IN EQUITY filed June 16, 1875, against Abraham Jackson, William M. Byrnes, and Ella S. Cahoon, alleging the following facts:

On March 27, 1873, the plaintiff was seised in fee simple of a certain parcel of land, with the dwelling-house thereon, situated on Ashland Street, in Boston. On that day, the defendant Jackson, intending and contriving to cheat and defraud the plaintiff of her said estate, fraudulently made or caused to be made a deed thereof to himself, with full covenants of warranty, and forged or caused to be forged thereto the name of the plaintiff as the grantor therein, and fraudulently procured the same to be acknowledged by some person other than the plaintiff; and in furtherance of this fraudulent purpose, on August 7, 1874, caused the said deed to be put on record with Suffolk deeds. Jackson, in furtherance of the purpose to injure and defraud the plaintiff in the premises, for the nominal consideration of $10,000, on March 31, 1873, executed and acknowledged a deed of release of the said land and buildings to the defendant Byrnes, which deed of release was, on April 14, 1875, recorded with Suffolk deeds. The deed to Jackson was a forgery, and was made, executed, acknowledged and recorded without the plaintiff's knowledge, signature or consent, and the deed to Byrnes was likewise without her knowledge or

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consent. The plaintiff immediately upon hearing of the record of the deeds, to wit, on or about June 8, caused a caveat to be put on record in said Suffolk Registry of Deeds, cautioning all persons from buying or interfering with the said estate.

The bill further alleged that Jackson, in furtherance of the said fraudulent purpose, in his own name, on or about September 1, 1873, executed a lease for a term of years of the said dwelling-house to James F. Maxwell, who, on April 31, 1875, assigned the same to the defendant Cahoon, who now holds the lease and occupies the premises, and claims to hold the same as against the plaintiff; that the lease was likewise made in fraud of the plaintiff's rights in the premises, and without her knowledge and consent; and the better to conceal his fraudulent purpose from the plaintiff, Jackson, notwithstanding the forgery of the deed and the execution of the lease, continued to collect and pay over the rents, or a portion thereof, of the premises to the plaintiff until April, 1875, giving her to understand and suppose all the while that he was, by parol agreement, letting the premises and managing the same for her.

The bill then alleged that the plaintiff applied to Cahoon, requesting her to pay over to her the rent of the premises, which Cahoon refused and still refuses to do; that the plaintiff fears the deeds aforesaid may be vexatiously or injuriously used against her when the evidence to impeach them is lost, and that they now throw a cloud or suspicion over her title or interest in the premises, and prevent her from the full and entire control and disposal of the same.

The prayer of the bill was, that Jackson and Byrnes might be severally ordered to cancel the aforesaid deeds, and that the said forged and pretended deed from the plaintiff to Jackson, and the deed from Jackson to Byrnes, and the lease from Jackson to Cahoon, be severally and respectively annulled by a decree of this court; and for general relief.

The defendant Byrnes demurred to the bill for want of equity. The case was heard by *Wells*, J., on the bill and demurrer, and reserved for the consideration of the full court.

H. C. Hutchins, for the defendant Byrnes.

S. J. Thomas, for the plaintiff, cited *Whittemore* v. *Cowell*, 7 Allen, 446; *Carr* v. *Silloway*, 105 Mass. 549.

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GRAY, C. J. Upon the allegations of the bill, the defendants Jackson and Byrnes have no title in the premises, and the other defendant is in possession under no other title than a lease from Jackson. The plaintiff's remedy at law, by writ of entry against Jackson or Byrnes, or both of them, is therefore full, adequate and complete, and this bill cannot be maintained. *Brewer* v. *Stevens*, 13 Allen, 346. *Pratt* v. *Pond*, 5 Allen, 59. *Metcalf* v. *Cady*, 8 Allen, 587. *Bassett* v. *Brown*, 100 Mass. 355. *Suter* v. *Matthews*, 115 Mass. 253. *Swamscott Machine Co.* v. *Perry*, *ante*, 123 *Bill dismissed.*

UNITED STATES MANUFACTURING COMPANY *vs.* A. N. CLARK & others.

Suffolk. November 15. — 20, 1875. WELLS & ENDICOTT, JJ., absent.

A. brought an action against B. and attached personal property. A. was then sued by a creditor, and B. summoned as trustee. Both actions were returnable to and entered at the same term. B. was adjudged a trustee, and paid on execution to A.'s creditor the full amount due from B. to A. Afterwards, during the same term, judgment was ordered for the plaintiff for his costs, in the action of A. against B., and the clerk taxed the costs down to the time of such judgment, including the fees for keeping the attached property after payment by the trustee. *Held*, under the Gen. Sts. *c.* 142, § 20, that the taxation of costs was correct.

APPEAL by the defendants from the taxation of costs by the clerk of the Superior Court, in an action of contract. The case was submitted to the Superior Court, and to this court, on appeal, upon an agreed statement of facts, in substance as follows:

The writ was dated October 19, 1874, was served the same day by attachment of personal property, and a keeper put in charge; the writ was returnable to, and entered at, January term 1875.

On November 16, 1874, an action was commenced by William A. Wallace, against the above plaintiff and the above defendants as trustees. Service was made on the trustees the same day. The writ was returnable to and entered at January term 1875; the trustees answered on January 15; the defendant was defaulted; the trustees were charged on their answer; judgment was rendered on January 30th against the principal defendant,

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and its funds in the hands of the trustees, for $636.82 damages and $17.49 costs. Execution issued on February 2, and on demand by the deputy sheriff was paid by the trustees on February 3.

On November 16, 1874, James N. Cutter and others commenced an action against the plaintiff, and the defendants were summoned as trustees. The writ was served the same day; was returnable to, and entered at, January term, 1875; the trustees filed an answer and were charged on the same, and judgment for the plaintiff was rendered on January 30, 1875; execution issued February 3, and on the same day the trustees paid to the officer having the execution $415.10.

The sums paid by the trustees in the last two suits were the full amount for which they had been sued in the first named action, with interest to date of payment.

An additional answer was filed on February 4, setting up the above facts in bar. On March 13, a replication was filed admitting the above facts, and claiming judgment for costs. This claim was resisted by the defendants, who contended that no costs could be recovered beyond the time of the service of the writs in which they were summoned as trustees. A hearing was had in the Superior Court, March 13, and the decision of the judge was announced on March 23, and entered upon the docket, "Judgment for plaintiff for costs."

At the hearing before the clerk on the taxation of costs, both parties were represented. After the above adjudication the defendants claimed to be heard at the taxation of costs; and at such taxation the assistant clerk allowed costs to the plaintiff up to the time of the above adjudication by the court, which included the cost of keeping the attached property to February 24, 1875, for which costs an amendment to the officer's return was allowed by the court. There were no costs after February 24, and no costs were taxed accruing after the answer of the trustees except the officer's fees for keeping property attached, stated in his amended return.

From this taxation the defendants appealed, contending that no costs should be allowed after service of the trustee writs, or after answer by the trustees, or after judgment against them, or payment by them.

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The Superior Court affirmed the taxation of costs; and the defendants appealed to this court.

T. F. Nutter, for the defendants.

J. S. Abbott, for the plaintiff.

GRAY, C. J. This action, and that in which the defendants were summoned as trustees of the plaintiff, were returnable at the same term. Until that term, this plaintiff could not know whether the trustee process would be entered, and these defendants were not and could not be adjudged his trustees therein, nor the fact stated on the record of this action. The plaintiff, by the express provision of the Gen. Sts. *c.* 142, § 20, was entitled to judgment in this action for the costs due to him, which must include the taxable costs before and at that term, and no more have been allowed in this case. *Taxation affirmed.*

RODERICK RICHARDSON *vs.* J. W. PIERCE & another.

Suffolk. November 19. — 20, 1875. — WELLS & COLT, JJ., absent.

A., holding a promissory note of which B. was the maker and C. the indorser, signed a composition deed whereby the creditors of B. released all claim against him, the deed to be null and void unless signed by all his creditors, and wrote after his name the words, "provided this does not release the indorser in any manner." In an action against B. by another creditor, who had signed the deed, C.'s name did not appear among the signers of the deed; but it was agreed that if the signing by A. did not release the indorser, then all the creditors had signed. *Held*, that the condition annexed by A. to his signature was equivalent to a reservation of his rights against C., and did not prevent his execution of the deed from operating as a release of all his rights against B.; and that the deed was a bar to the action.

CONTRACT against J. W. Pierce and J. E. Lochman, on a promissory note dated May 20, 1873, payable four months after date, signed by Greenlaw & Gillis, and payable to the order of David Gillis, and indorsed by him and by each of the defendants. Writ dated January 20, 1874. The action was defended by Pierce alone. His answer set up a deed of composition dated October 8, 1873, between himself and his creditors, by which, in consideration of the payment of fifty per cent. of their respective claims, they agreed to release him from all claims which they then

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had against him, the deed to be null and void if not signed by all his creditors. This deed was signed by the plaintiff among others, but Lochman's name did not appear among the signers.

At the trial in the Superior Court, before *Allen*, J., it appeared that Samuel B. Rindge held a promissory note, of which Pierce was the maker and Lochman the indorser. The composition deed was signed "Samuel B. Rindge, provided this does not release the indorser in any manner." The plaintiff contended this was not a valid signing in contemplation of the agreement. It was admitted if this did not release the indorser, then all the creditors had signed. The judge submitted the question to the jury, whether the paper was signed by all the creditors. The jury found for the defendant; and at the request of the parties the judge reported the case to this court.

If the above signing was valid, judgment was to be entered on the verdict for the defendant; otherwise a new trial to be had.

S. J. Thomas, for the plaintiff.

J. H. Hardy, for the defendant Pierce.

GRAY, C. J. The condition annexed by Rindge to his signature of the deed of composition was equivalent to a reservation of his rights against Lochman as indorser of the note held by Rindge, and did not prevent his execution of the deed from operating as a release of all his rights against Pierce as maker of that note, although it could not affect any right of Lochman against Pierce. *Sohier* v. *Loring*, 6 Cush. 537. *Tobey* v. *Ellis*, 114 Mass. 120. But the report expressly states that if this execution of the deed by Rindge did not release the indorser, all the creditors of Pierce had signed the composition deed — which, as Lochman's name does not appear among the signers of that deed, necessarily implies that the relation between him and Pierce was such that he was not a creditor of Pierce, and would not, if called upon to pay the note as indorser, have any right to recover against Pierce. The deed of composition, having been signed by all the creditors of Pierce, is a bar to this action against him.

Judgment on the verdict for the defendant.

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MEMORANDUM.

ON the twenty-third day of November, 1875, Mr. Justice WELLS died at Salem, having held the office of an associate justice of this court since the twenty-second day of September, 1866.

OLIVE B. SABINS *vs.* BENJAMIN W. JONES.

Bristol. Oct. 28. — Nov. 27, 1875. MORTON, J., absent.

A justice of a District Court may receive a complaint, under the bastardy act, and issue a warrant, when the court is not in session.

A complaint under the bastardy act was addressed to the justice of a District Court and his certificate to the jurat contained the words "before said court," followed by his signature with his official description. The warrant issued on the complaint was signed by his name and official description. *Held*, that the complaint sufficiently appeared to be made to the justice and sworn to before him, and that he issued the warrant; and that it was to be presumed that he acted under his authority as justice, and that the court was not in session.

A supplementary complaint filed in the Superior Court, in a bastardy proceeding, need not be sworn to.

Evidence is not admissible, in a bastardy proceeding, that the complainant had criminal intercourse with men, other than the respondent, more than twelve months before the birth of her child.

At the trial of a complaint under the bastardy act, the respondent put in evidence the deposition of a witness, who testified on direct examination to having had intercourse with the complainant at a certain time. On reëxamination he testified to having seen the complainant having intercourse with other men at a time more than twelve months before the birth of her child. After the signature of the witness was a memorandum of the magistrate, who took the deposition, to the effect that after the counsel for the complainant had left, the witness wished to correct his statement as to the time mentioned in his direct examination, that the counsel for the complainant was recalled and objected, and the magistrate declined to make the correction. The respondent was found guilty, and a bill of exceptions was allowed, which stated that the judge excluded the reëxamination. *Held*, that the memorandum of the magistrate did not form part of the reëxamination, and that the bill of exceptions did not show that the memorandum was excluded.

COMPLAINT under the bastardy act, Gen. Sts. *c.* 72, to the justice of the Third District Court of Bristol, alleging that the complainant was then pregnant with child, which, if born alive, would be a bastard, accusing the respondent with being the father

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of the child, and charging that the child was begotten on February 15, 1874, in Dartmouth. The jurat on the complaint was as follows: "Bristol ss. Received and sworn to on the fourteenth day of August, in the year of our Lord eighteen hundred and seventy-four, before said court. Alanson Borden,

"Justice of the Third District Court of Bristol."

The warrant issued on the complaint recited that the complaint had been made "on oath to the justice of the Third District Court of Bristol," and was signed by the judge with his official description.

In the District Court, the respondent moved to dismiss the complaint "because it appears to have been made to, and taken and issued by, Alanson Borden, justice of the Third District Court of Bristol, as such, and not by said court, nor a justice of the peace; and therefore he moves that the same be dismissed and quashed, as issued by a person having no legal authority to issue the same in the capacity in which it was done." This motion was overruled; the respondent was adjudged guilty and required to give bond for his appearance before the Superior Court.

In that court a supplementary complaint was filed but not sworn to, setting forth the previous proceedings, and alleging the birth of the child on November 10, 1874. The respondent moved to dismiss the supplementary complaint because it was not sworn to, and also moved to dismiss the original complaint for the reason before assigned. These motions were overruled by *Pitman*, J. The respondent was then tried.

The deposition of William P. Reed, taken on June 7, 1875, was offered in evidence in behalf of the respondent. This witness testified that he had criminal intercourse with the complainant four times. In answer to the 9th interrogatory he fixed the time as in January and February, 1873. In answer to the 10th interrogatory he said it was "fourteen months from the past winter;" and in answer to the 12th interrogatory that it was "a year ago last January or February."

Under the head of "Re-direct," the deposition contained interrogatories to and answers by the witness, to the effect that he had seen other men have criminal intercourse with the complainant "about a year ago last October." Then followed the signa-

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ture of the witness and immediately after it was a memorandum of the magistrate, who took the deposition, to the effect that after the witness had signed, and after the counsel for the complainant had left, the witness asked to have the date in the answer to the 9th interrogatory changed from 1873 to 1874; that the counsel for the complainant was recalled and objected, and the change was not made.

"The counsel for the complainant objected to that part of said deposition headed 'Re-direct,' and the court excluded that portion of the deposition from being read to or going to the jury." The jury returned a verdict of guilty; and the respondent alleged exceptions.

L. Lapham, for the respondent.

J. M. Morton, Jr., for the complainant.

ENDICOTT, J. The objections to the jurisdiction of the court were seasonably taken. It is contended that the justice of the District Court had no authority to receive the complaint and issue the warrant. But the District Court and the justice thereof have the same jurisdiction, power and authority as Police Courts and the justices thereof have under the Gen. Sts. *c.* 116. St. 1874, *c.* 293, §§ 1, 5. By the Gen. Sts. *c.* 116, § 16, the justice of a Police Court may receive complaints and issue warrants when the court is not in session; and this section applies to complaints under the bastardy act. *Richardson* v. *Burleigh*, 3 Allen, 479. It sufficiently appears that the complaint in this case was received by the justice, sworn to before him, and that he issued the warrant. Having authority to do this, it is to be presumed that he acted under that authority, and that the court was not in session at the time, although in form it is stated to be sworn to before the court. *Richardson* v. *Burleigh*, *ubi supra*.

Nor is it necessary that the supplemental complaint filed in the Superior Court should be sworn to by the complainant. Such complaint is not the foundation of the proceedings, but is rather a mode of stating the material facts and framing the issues to be tried in the Superior Court, and may be signed by the attorney of the complainant. *Burt* v. *Ayers*, 116 Mass. 263. *Reed* v. *Haskins*, 116 Mass. 198.

The reëxamination in the deposition of Reed was properly excluded. It related to acts of sexual intercourse, between the

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complainant and other men, more than twelve months before the birth of the child, and was not admissible in evidence. *Paull* v *Padelford*, 16 Gray, 263. *Eddy* v. *Gray*, 4 Allen, 435. *Parker* v. *Dudley*, 118 Mass. 602.

The defendant contended at the argument in this court that the effect of the exclusion of the reëxamination was to exclude the memorandum of the magistrate showing that the witness wished to correct an error in his direct examination, relating to the time of his intercourse with the complainant. But this memorandum is no part of the reëxamination. That had been closed and the deposition signed before the memorandum was made. Even if the memorandum could properly be taken to be a part of the deposition, it relates only to the direct examination, and it does not appear from the bill of exceptions that it was excluded. *Exceptions overruled.*

SILAS D. CROSSMAN & others *vs.* EDWARD H. FIELD & another.

Bristol. Oct. 28. — Nov. 27, 1875. MORTON, J., absent.

A testatrix by her will, after directing payment of all her debts, provided as follows "All my property both real and personal of whatsoever name or kind (except what shall be disposed of hereafter) I give for the maintenance support and bringing up of my niece J. F. under the management of my brother E. C. as guardian during his lifetime provided he does not bring home his wife F. or marry with some other person in which case my brother D. C. is to have the management or guardianship heretofore named, and if the said J. F. should not live, then the property which I now give to her, the improve only I give to my brother E. C. during his lifetime, provided he marries not nor supports his present wife in which case it must go to my brothers A. and D. C.," and then gave specific legacies to other persons. *Held*, that J. F. took an estate in fee.

PETITION for partition, filed December 18, 1874, by the heirs of Ebenezer Crossman, of a parcel of land in Taunton, alleging that they were tenants in common with the respondents, Edward H. Field and Henry Field, Jr. Trial in the Superior Court, before *Wilkinson*, J., who, after verdict, reported the case for the determination of this court in substance as follows:

It was admitted that the title to the land was in Mercy Crossman at the time of her death in 1834. The material parts of

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her will, which was dated September 2, 1834, and admitted to probate on November 7 of the same year, were as follows:

"And first, that all my debts shall be paid and secondly that all my property both real and personal of whatsoever name or kind (except what shall be disposed of hereafter) I give for the maintenance support and bringing up of my niece Julia Frances Crossman, under the management of my brother Edward Crossman as guardian during his lifetime provided he does not bring home his wife Fanny or marry with some other person in which case my brother Daniel Crossman is to have the management or guardianship heretofore named, and if the said Julia Frances should not live, then the property which I now give to her, the improve only I give to my brother Edward during his lifetime provided he marries not nor supports his present wife in which case it must go to my brothers Ebenezer Crossman and Daniel Crossman.

"Thirdly. I give to my nephew John H. Crossman one hundred and fifty dollars in cash and fourthly to Mrs. Sarah Walters my niece the amount of fifty dollars in furniture."

It further appeared that Mercy Crossman was unmarried, and that her heirs at law were her brothers, Ebenezer, Daniel, Josiah and Edward, all of whom are now dead. There are no descendants of Daniel living, and Josiah was unmarried.

It further appeared that Edward Crossman left one child only, a daughter, Julia Frances, who is the person mentioned by that name in the will of Mercy Crossman; that Julia Frances first married one Waldron, who died leaving no issue by her; and that afterwards she married Henry Field, Jr., one of the respondents, by whom she had one child, Edward H. Field, the other respondent, both of whom are now living; and that Julia Frances died in 1849. It did not appear that any of the property of Mercy Crossman had been disposed of or conveyed for the maintenance, support or bringing up of Julia Frances.

Upon these facts, the judge ruled that the will of Mercy Crossman devised to Julia Frances a fee in the land described in this petition, and that this petition could not be maintained, and directed the jury to return a verdict for the respondents.

C. A. Reed, for the petitioners.

W. E. Fuller & S. M. Thomas, for the respondents.

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GRAY, C. J. The intention of the testatrix to give an estate in fee to her niece is manifested in several ways:

1st. By the use of the words "all my property, both real and personal, of whatsoever name or kind," which, in a will, ordinarily pass a fee. *Godfrey* v. *Humphrey*, 18 Pick. 537. *Leland* v. *Adams*, 9 Gray, 171. *Lincoln* v. *Lincoln*, 107 Mass. 590.

2d. By the addition of the words "except what shall be disposed of hereafter," which confirm the presumption that the testatrix did not intend to die intestate as to any part of her estate. *Tracy* v. *Kilborn*, 3 Cush. 557. *Gleason* v. *Fayerweather*, 4 Gray, 348.

3d. By the subsequent description of the subject of the devise as the "property which I now give to her." See cases under first point, *supra*.

4th. By contrast with the devise over of "the improve only" to Edward Crossman, giving him but a life estate. *Fay* v. *Fay*, 1 Cush. 93.

5th. By the consideration that if the word "it" in the final limitation to Ebenezer and Daniel imports a fee, (and so would prevent an intestacy as to the remainder, as would be the case if they should take only a life estate,) the implication is unavoidable that a like fee had previously been devised, which could only be to the niece.

The proviso that if the niece "should not live" is exactly equivalent to "if she should die," or "in case of her death," and (as she must die at some time, and no other period is mentioned in the will) must apparently be construed "if she should not survive me," the testatrix. *Briggs* v. *Shaw*, 9 Allen, 516. 2 Jarman on Wills, *c.* 48. But if the will could be construed to give the niece an estate in fee, subject to be devested upon her dying before Edward Crossman, she did in fact survive him, and the contingency upon which her estate would be devested has not arisen. *Brightman* v. *Brightman*, 100 Mass. 238. *Kimball* v. *Tilton*, 118 Mass. 311.

The legal effect of all the provisions of the will is too clear to be restricted by the mention of the purpose of the devise to the niece as for her "maintenance, support and bringing up;" by the appointment of Edward, or in certain contingencies Daniel,

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to be her guardian; or by the consideration that, if the niece takes a fee, some of the limitations over may be repugnant and void. *Judgment on the verdict.*

DENNIS CALLAGHAN *vs.* POCASSET MANUFACTURING COMPANY.

Bristol. Oct. 28. — Nov. 29, 1875. MORTON, J., absent.

If a day laborer works for a corporation under an agreement, by which the amount, to become due him monthly, is paid in advance to a third person, who is to account to the laborer for it at the end of each month, the corporation is not liable in a trustee process to a creditor of the laborer, although the third person to whom the money is paid is the treasurer of the corporation.

SCIRE FACIAS upon a judgment recovered against the defendant in a trustee process in which it was summoned as trustee of Matthew Burke. In the Superior Court, interrogatories were filed to the defendant, and on its answers thereto it was discharged, and judgment ordered for the plaintiff for his costs only; and the plaintiff appealed to this court. The facts of the case appear in the opinion.

W. H. Peirce, for the plaintiff.

E. Williams, for the defendant.

DEVENS, J. The answers of the defendant to the plaintiff's interrogatories disclose a contract between it and Matthew Burke, by which Burke agreed to work as a day laborer in its employ, and by which it agreed to pay him monthly in advance. This advance payment was not made directly to Burke, but by his consent to a third person, who was the treasurer of the defendant corporation. It further appeared that in the early part of the month in which the writ was served the sum of $40 had been thus advanced by the defendant to such third person, and that, at the time of the service of the writ in the trustee process, Burke's work had amounted during that month to the sum of $37.50, so that a small amount in excess of that actually due for work done had thus been paid by the defendant. Even if the amount of the $37.50 still remained in the hands of the third person, and had not actually been delivered over to Burke, there

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was no existing liability of the defendant to him, nor any debt which could then or afterwards be the subject of a suit by him. A laborer, if he desires, may contract that his wages shall be paid in advance, and such payment, whether made directly to him, or to a third person at his request, discharges any liability which might otherwise exist on the part of those with whom he thus contracts, when the work is actually performed. Even if it is the duty of the person holding the money to pay it back to those from whom he received it, in case the workman should not perform the labor, or such part as would represent the labor unperformed, should it be only partially performed, this would not, at least in the absence of fraud, affect the case, as such an arrangement would not place the alleged trustee under any liability to the workman, or leave any of his goods, effects or credits in his hands.

Nor is the contract affected by the fact that the third person to whom the advance payment was made was also a servant of the alleged trustee; its liability was not the less completely discharged, and it owed nothing to Burke for the labor performed by him. *Judgment affirmed.*

Harrison G. Wilson *vs.* City of Lynn.

Essex. Nov. 5. — 30, 1875. Colt & Morton, JJ., absent.

Under the St. of 1871, c. 218, authorizing the city of Lynn, for the purpose of supplying the city with pure water, to take, hold and convey into the city the waters of Breed's Pond and all water rights connected therewith, and to take and hold, by purchase or otherwise, such land on or around the margin of said pond, not exceeding five rods in width, as may be necessary for the preservation and purity of said waters; and requiring the mayor to file in the registry of deeds "a description thereof sufficiently accurate for identification," and the city to pay the damages caused by such taking; the city took certain land, and filed in the registry of deeds a certificate, which described the land as "a lot commencing at the southwest corner of land owned by Charles H. Trask on Walnut Street," and running by four courses and distances, 1896 feet in all, by the northerly line of that street: thence by four successive courses and distances, each except the last terminating at a cedar post, amounting in all to 1703 feet, "to a point on the Downing road (westerly line) at its intersection with Elm Street;" thence by three courses and distances on "westerly line of road," 2496 feet in all; thence by nineteen courses and distances, each except the last terminating at a cedar post, and amounting

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to 8985 feet in all, "to starting point." The names of the owners of the land taken were not mentioned, nor the town or city in which the land was situated, and no plan was referred to in the description or filed with it. At the trial of an action of trespass, brought by the owner of land so taken, against the city, no monuments were proved except along about two thirds of one side of the tract of land intended to be taken; it appeared that a very small portion of it was within the city of Lynn; a plan was introduced, subject to the plaintiff's objection, of the entire tract of land taken, and a surveyor testified that the lot could be traced and its limits made certain by the plan; but there was no evidence that the land could be identified by the description filed without the aid of the plan or of a surveyor; and it did not appear that all of the cedar posts, called for by the description, or which, or how many of them, had been set up. *Held*, that the certificate was insufficient, and that the defendant was a trespasser.

GRAY, C. J. This is an action of tort in the nature of trespass for breaking and entering the plaintiff's close, digging up and subverting the soil, carrying away large quantities of earth and gravel and inundating thirty acres of land.

The defendant justifies its acts as having been done for the purpose of supplying the city and its inhabitants with pure water, under the St. of 1871, *c.* 218.

The first section of that statute authorized the city for that purpose "to take, hold and convey into and through said city the waters of Breed's Pond, so called, in said city, and the waters which flow into and from the same, and any water rights connected therewith, and the streams running into Beaver Brook below Breed's Pond;" and to "take and hold, by purchase or otherwise, such land on and around the margin of said pond, not exceeding five rods in width, as may be necessary for the preservation and purity of said waters."

By section 2, "the mayor of said city of Lynn shall, within sixty days after taking any of the land aforesaid, file in the registry of deeds for the county of Essex, southern district, a description thereof sufficiently accurate for identification."

By section 4, "said city shall be liable to pay all damages sustained by any person or corporation, by taking of any land, water, water rights or property, or by the constructing of any aqueduct, reservoir or other works for the purposes aforesaid; and if any person or corporation, sustaining damages as aforesaid, cannot agree with the city upon the amount of such damages, he or it may have them assessed in the same manner as is provided by law with respect to land taken for highways."

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It is admitted that no previous notice was given to the plaintiff or other landowner of any intention to take their lands, and no hearing was had upon the subject; and that no bounds or monuments were set up to distinguish the lots of the respective proprietors.

The certificate filed by the city in the registry of deeds,* de-

* "City of Lynn. In Common Council, October 8th, 1873.

"Ordered, that the following described lot of land, viz.: a lot of land commencing at the southwest corner of land owned by Charles H. Trask on Walnut Street and running upon a course N. 79° 15′ W. (magnetic) for a distance of 252 feet; thence upon a course N. 69° 30′ W. (magnetic) for a distance of 538 feet; thence upon a course N. 55° 22′ W. (magnetic) for a distance of 804 ft.; thence upon a course N. 56° W. (magnetic) for a distance of 302 ft.; (the above representing the northerly line of Walnut Street;) thence upon a course N. 34° E. (magnetic) for a distance of 150 ft., to a cedar post; thence upon a course N. 56° W. (magnetic) for a distance of 464 ft., to cedar post; thence upon a course N. 46° 50′ W. (magnetic) for a distance of 767 ft., to cedar post; thence upon a course S. 70° W. (magnetic) for a distance of 822 ft., to a point on the Downing road (westerly line) at its intersection with Elm Street; thence upon a course N. 33° 45′ W. (magnetic) being the westerly line of road for a distance of 988 ft.; thence upon a course N. 41° W. (magnetic) being the westerly line of road for a distance of 943 ft.; thence upon a course N. 16° 52′ W. (magnetic) being the westerly line of road for a distance of 565 ft.; thence upon a course S. 64° 10′ E. (magnetic) for a distance of 216 ft., to cedar post; thence upon a course N. 25° 50′ E. (magnetic) for a distance of 953 ft., to cedar post; thence upon a course N. 66° 50′ E. (magnetic) for a distance of 228 ft., to cedar post; thence upon a course S. 23° 10′ E. (magnetic) for a distance of 300 ft., to cedar post; thence upon a course N. 66° 50′ E. (magnetic) for a distance of 345 ft., to cedar post; thence upon a course S. 23° 10′ E. (magnetic) for a distance of 422 ft., to cedar post; thence upon a course N. 77° 30′ W. (magnetic) for a distance of 436 ft., to cedar post; thence upon a course S. 25° 40′ W. (magnetic) for a distance of 800 ft., to cedar post; thence upon a course S. 60° E. (magnetic) for a distance of 150 ft., to cedar post; thence upon a course S. 30° W. (magnetic) for a distance of 106 ft., to cedar post; thence upon a course S. 48° 40′ E. (magnetic) for a distance of 498 ft., to cedar post; thence upon a course N. 76° 15′ E. (magnetic) for a distance of 289 ft., to cedar post; thence upon a course S. 60° E. (magnetic) for a distance of 254 ft., to cedar post; thence upon a course S. 43° 10′ E. (magnetic) for a distance of 900 ft., to cedar post; thence upon a course S. 28° 30′ E. (magnetic) for a distance of 600 ft., to cedar post; thence upon a course S. 58° 30′ E. (magnetic) for a distance of 1110 ft., to cedar post; thence upon a course S. 6° 30′ E. (magnetic) for a distance of 500 ft., to cedar post; thence upon a course S. 56° 20′ E. (magnetic) for a distance of 528 ft., to cedar post; thence upon a course S. 16° 10′ E. (magnetic) for a distance of

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scribes the land taken as "a lot commencing at the southwest corner of land owned by Charles H. Trask on Walnut Street," and running by four courses and distances, 1896 feet in all, by the northerly line of that street; thence by four successive courses and distances, each except the last terminating at a cedar post, amounting in all to 1703 feet, "to a point on the Downing road (westerly line) at its intersection with Elm Street;" thence by three courses and distances on "westerly line of road," 2496 feet in all; thence by nineteen courses and distances, each except the last terminating at a cedar post, and amounting to 8985 feet in all, "to starting point."

The plan introduced by the defendant at the trial, which is not referred to in the description and does not appear to have been filed with it, and to the admission of which in evidence the plaintiff for that reason objected, shows a tract of land, marked by corresponding courses and distances, of irregular shape, more than a mile long, and of width varying from a mere point or angle at each end to something less than a quarter of a mile at the widest part, containing about one hundred acres, and including Birch Brook, which is not named in the statute, but is a tributary of Beaver Brook, running into it below Breed's Pond, and which, as the report finds, substantially dries up in summer time.

The surveyor who made the plan testified to its general correctness, and that the lot could be traced and its limits made certain by that plan. But there was no evidence that the land could be identified by the description filed, without the aid of the plan or of a surveyor; and it did not appear that all of the cedar posts called for by the description, or which or how many of them, had been set up.

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350 ft., to starting point, — be and the same is hereby taken by the city of Lynn, for the purposes named, and in accordance with the provisions contained in the 218th chapter of the acts of the General Court of Massachusetts, for the year 1871, entitled "An act to supply the city of Lynn with pure water," and the mayor is hereby instructed to record said description of the land so taken in the manner required in section 2d of said act.

"Adopted and sent up for concurrence. S. Henry Kent, Clerk.

"In Board of Aldermen, October 14, 1873. Adopted in concurrence Benj. H. Jones, City Clerk."

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Even if the corner of Charles H. Trask's land, assumed as the starting point of the description filed by the city, is a monument capable of being identified; and if the subsequent boundaries on "westerly line of road" can be referred to the Downing road rather than to Elm Street which that road intersects; no monuments whatever are proved, except along about two thirds of one side of the tract of land intended to be taken, and no means are afforded of ascertaining the remaining boundaries except by courses and distances. No names of owners of the land taken are mentioned; nor even the town or city in which the land intended to be taken is situated; and it was admitted at the argument that but a small portion of the tract, near the starting point, is in the city of Lynn, and the rest in the town of Saugus.

The case differs from that of the location of a highway or railroad, in which the width of the land taken throughout the whole length of the way is stated and the terminus at each end clearly defined; and is wholly unlike the case of a deed made by the landowner himself, or the levy of an execution, of which he has distinct notice.

If the plan had been referred to as part of the description, it might have been sufficient. *Stone* v. *Cambridge*, 6 Cush. 270. *Hazen* v. *Boston & Maine Railroad*, 2 Gray, 574. *Andover* v. *County Commissioners*, 5 Gray, 393. But without such reference, or any other notice to the owner of the land, the description before us cannot be held to be "sufficiently accurate for identification," as the statute requires.

The case, in our opinion, imperatively calls for the application of the rule stated by this court in *Glover* v. *Boston*, 14 Gray, 282, 288: "The appropriation of private property to the public use, which is one of the highest acts of sovereign power, should not be accomplished by ambiguous or uncertain language. The presumption is in favor of the owner of the land, and any act done by public authority, which interferes with his rights, should be, as it always may be, clear and intelligible." See also *Hinckley* v. *Hastings*, 2 Pick. 162; *Jeffries* v. *Swampscott*, 105 Mass. 535 *Pinkerton* v. *Boston & Albany Railroad*, 109 Mass. 527, 538 *Housatonic Railroad* v. *Lee & Hudson Railroad*, 118 Mass. 391 *Lewiston* v. *County Commissioners*, 30 Maine, 19.

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The defendant, never having filed the certificate required by statute, was a trespasser, and for this reason, without considering the other objections made by the plaintiff to the validity of the defendant's proceedings, the case, according to the terms of the report, is to *Stand for trial.*

S. B. Ives, Jr. & S. Lincoln, Jr., for the defendant, were first called upon.

J. C. Perkins & J. W. Perry, for the plaintiff, were stopped by the court.

JOSEPH YOUNG & another *vs.* THE ORPHEUS.
CHARLES W. LEWIS & another *vs.* SAME.
HENRY JONES *vs.* SAME.

Suffolk. Nov. 12, 1874. — Nov. 27, 1875. DEVENS, J., absent.

Under the St. of 1855, c. 231, no lien can be claimed for lumber furnished for the construction of a vessel, which has not been used in her construction, or fitted and prepared for that purpose.

Neither the fact that materials are furnished for the construction of a vessel on credit, nor the fact that they are delivered primarily on the credit of the builder of the vessel, defeats a lien under the St. of 1855, c. 231, if no note or security is taken, and exclusive credit is not given to the builder.

Under the St. of 1855, c. 231, § 2, a lien, for materials used in the construction of a vessel, is not dissolved by a clerical error, in the certificate filed in the office of the town clerk, in adding up the items of the account, which themselves clearly show the amount of the demand claimed and actually due Nor is such lien dissolved by the including in the certificate of materials furnished for the vessel, but for which no lien in fact exists, they not having been used in her construction.

Under the St. of 1855, c. 231, § 2, declaring that a lien on a vessel shall be dissolved unless a certificate is filed "within four days from the time such ship or vessel shall depart from the port at which she was when the debt was contracted," the certificate may be filed before the vessel departs from the port.

The port of Boston is not limited to the municipal limits of Boston, but includes the opposite shore of Chelsea; and under the St. of 1855, c. 231, § 2, declaring that a lien on a vessel shall be dissolved unless a certificate is filed "within four days from the time such ship or vessel shall depart from the port at which she was when the debt was contracted, in the office of the clerk of the city or town within which such ship or vessel was at the time the debt was contracted," a vessel does not depart from the port by leaving, in an unfinished condition, the town of Chelsea, where she was when the debt was contracted and going to Boston; and a certificate filed, in Chelsea, more than four days after such leaving, and before she leaves Boston, is seasonably filed.

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A vessel sailed from Boston in March, 1856, and did not return to any port of this Commonwealth until July, 1871, when a petition was filed to enforce a lien for a debt contracted shortly before her departure. The vessel had in the mean time been in different ports of the United States, and her arrival there was announced in the usual manner, but there was no evidence that the petitioner had actual notice thereof. *Held*, under the St. of 1855, c. 231, § 1, declaring that the lien "shall continue until the debt is satisfied," that the petition was seasonably filed, although her ownership had been changed.

On a petition to enforce a lien on a vessel under the St. of 1855, c. 231, if interest is not due as part of the debt, but as damages only, it is to be computed from the filing of the petition, and not from the time of a prior demand; and the fact that before bringing the petition, proceedings were had in a court of the United States which were dismissed for want of jurisdiction, makes no difference.

PETITIONS to enforce liens under the St. of 1855, c. 231, on the ship Orpheus, for materials furnished for and used in her construction in 1855 and 1856. The cases were tried together in the Superior Court, before *Brigham*, C. J., without a jury. The facts found by him, so far as it is material to state them, were as follows:

In August, 1855, Mitchell & Rice, ship-builders, having their place of business in Chelsea, made an express contract with William F. Weld & Co. of Boston, to build for them a ship of about twelve hundred tons for a specified price. The petitioners in each case, under an oral contract with Mitchell & Rice, delivered to them, at various dates from September, 1855, to February, 1856, at a price agreed, several cargoes of lumber, all of which was furnished for and in relation to the construction of said ship, and was actually used in such construction, except a few thousand feet, in each of the first two cases, of which a small part, but how much did not appear, was used in launching the ship at Chelsea, and the rest amounting in value to $411.68, in the first case, and $22.50 in the second, was subsequently sold by the assignees in insolvency of the estate of Mitchell & Rice, and its proceeds appropriated to the use of that estate.

By the contract with the petitioners in the first case, Mitchell & Rice were to have a credit of sixty to ninety days on the price of the lumber, and the lumber was not furnished by the petitioners upon the credit of the ship exclusively, but principally upon the credit of Mitchell & Rice, in view, however, of an ulterior liability of the ship and its owners for the lumber, upon the failure of Mitchell & Rice to pay for the same, which they had

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promised to do. In the second case, the lumber was furnished by the petitioner upon the credit of the ship. In the third case, the lumber was ordered by Mitchell & Rice, stating that they wanted it for the ship, and it was furnished primarily upon their credit.

At the time when the contract with each of the petitioners was made and the lumber furnished under it, the ship was in the course of construction at Chelsea. She was launched unfinished at Chelsea on February 29, 1856, and on the same day was taken to Lewis's Wharf, in Boston, where her construction was continued and completed, in hull, spars, rigging and sails, and a small portion of the lumber furnished as aforesaid by the petitioners was there used for making chocks for boats and other similar purposes.

On March 22, 1856, the ship, with a cargo on board, sailed from Boston for San Francisco, and did not return to Boston or to any port in Massachusetts until July, 1871, when she was detained by process in these cases. In the intervening time she was frequently in other ports of the United States, and her arrival there was announced in the usual mode in the newspapers, but there was no evidence that the petitioners had actual notice thereof.

On March 15, 1856, the ship was seized by the marshal upon process issued by the District Court of the United States for the District of Massachusetts, upon libels of these petitioners to enforce the same liens and debts. Upon stipulations of the respondents, the ship was delivered to them, and the libels were dismissed by the District Court, and by the Circuit Court of the United States upon appeal, because the courts of the United States had no jurisdiction in admiralty to enforce liens against the ship for labor and materials furnished before she was launched. *The Orpheus*, 3 Ware, 143; *S. C.* 2 Cliff. 29.

The petitioners in the first and second cases filed in the office of the town clerk of Chelsea, on February 28, and March 19, 1856, and in the office of the city clerk of Boston, on March 25, 1856, and the petitioner in the third case filed in the office of the town clerk of Chelsea, on March 19, 1856, and in the office of the city clerk of Boston, on March 25, 1856, a certificate containing a statement, subscribed and sworn to by the petitioner, giving

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a just and true account of the demand claimed to be due to him for furnishing said lumber for and in relation to the construction of the ship, with all just credits; except in the first case, as the account might be affected by the credit of sixty to ninety days as before mentioned; and in the second case that the footing of the account was erroneously stated at $462.83, when it should have been stated at $362.83, as appeared upon the face of the account by examining the items added up. Each certificate also stated the names of the persons with whom the contract under which the lumber was furnished was made, the names of the owners of the ship, and the name and description of the ship sufficient for identification; but in the first and second cases did not contain a statement containing a just and true account with all just credits of the quantity and value of the lumber furnished as aforesaid, which was actually used in the construction of the ship, but included all the lumber delivered as aforesaid under the contract.

The petitioners have not been paid any part of the amounts claimed in their respective petitions.

William F. Weld & Co., before these petitions were filed, either by payments in cash or by the discharge of liens claimed upon said ship, have paid to Mitchell & Rice the full price agreed for the construction of said ship, but none of such payments or discharges of liens have been for the benefit of the petitioners, or have operated to discharge the liens or pay any part of the sums of money claimed in these petitions.

Some years before the return of the ship to Boston, the firm of William. F. Weld & Co. was dissolved, William. F. Weld and William. G. Weld retiring therefrom, and Richard Baker, Jr., previously a partner of said firm, forming a new firm, under the style of William. F. Weld & Co., consisting of Richard Baker, Jr., and George W. Weld, of Boston, and Frederick Baker, of New York, of which dissolution and formation public notice was given in the newspapers, and thereupon the ship became the property of the new firm, which defends these suits.

Chelsea, in 1855 and 1856, had piers or wharves for the loading and unloading of vessels, houses and stores, and a municipal organization wholly independent of Boston, and by the U. S. St. of 1850, *c.* 79, an inspector of customs, and was within the revenue district for the purposes of customs of the port of Boston.

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Upon the foregoing facts and their effect, the judge ruled "that the ship, within the meaning and scope of the St. of 1855, *c.* 231, was partly constructed in the port of Chelsea, and partly constructed in the port of Boston; that within the meaning and scope of that statute, the port of Chelsea was no part of the port of Boston, but another and different port therefrom, and that the removal of the ship from Chelsea to Boston, on the day of her launching, on February 29, 1856, was a departure of the ship from the port of Chelsea; that the certificates filed in the office of the clerk of the town of Chelsea on February 28, and March 19, 1856, were not so filed within four days 'from,' that is to say 'after,' the departure of the ship from the port of Chelsea, where she was when Mitchell & Rice contracted with the several petitioners the debts for which liens are sought to be enforced in these cases; and that the filing of the certificates on March 25, 1856, in the office of the clerk of the city of Boston, were within four days 'from,' that is to say 'after,' the departure of the ship from the port of Boston, on March 22, 1856, but were of no legal effect, she not having been in the port of Boston when the debts to which said certificates relate were contracted."

The judge also ruled, "that, irrespectively of the failure to file said certificates seasonably, and if the petitioners' exceptions to the rulings of the court thereon are sustained, the petitioners, upon the legal effect of the facts found by the court, cannot maintain their several petitions, especially for interest upon their claims from, or in any relation to, the time of their libels in the United States District Court."

Upon the foregoing rulings the judge found for the respondents; and the petitioners excepted to his rulings and findings.

E. F. Hodges & J. F. Barrett, for the petitioners.

E. H. Derby, for the respondents.

GRAY, C. J. The St. of 1855, *c.* 231, § 1, under which the rights asserted in these cases arose, gave a lien upon a vessel whenever by virtue of any contract, express or implied, with her owners, or with any agent or contractor of such owners, or with any person employed to construct, repair or launch her, money was due to any person "for labor performed, materials used, or labor and materials furnished, in the construction, launching or repairs of, or for constructing the launching ways for, or for pro-

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visions, stores or other articles furnished for or on account of ' the vessel.

1. The words "or labor and materials furnished" were inserted to make it clear that the statute covered the case of a person who did not himself perform the labor or own the materials, but obtained labor or materials from third persons to carry out his contract with the owners or their representative. But the "labor and materials furnished," as well as the "labor performed" and "material used," must be "in the construction, launching or repairs of, or for constructing the launching ways for" the ship. The statute does not allow labor and materials, as it does stores and provisions, to be merely furnished "on account of" the ship; and the difference in the language of the two clauses is significant. The statute doubtless includes materials fitted and adapted to be parts of the ship, and accepted as such by the other party to the contract, even if they have not been put in place upon the ship. But it gives no lien for materials which have neither been built upon or attached to her, nor been prepared and fitted for that purpose, and which have not been actually or constructively made part of her. *The Antarctic*, 1 Sprague, 206. *The Peruvian*, 3 Ware, 154. *Rogers* v. *Currier*, 13 Gray, 129, 132. *Barstow* v. *Robinson*, 2 Allen, 605. *Jones* v. *Keen*, 115 Mass. 170, 184, 185.

It follows that the petitioners were entitled to liens for so much only of the lumber and plank furnished by them, as was actually used in the construction of the vessel. Although a small portion of the rest was used in launching her, it does not appear how much in amount or value was so used, and no lien can therefore be sustained because of such use.

2. Neither the allowance of credit in one of the cases, nor the fact that in that case, and in one of the others, the materials were delivered primarily on the credit of the builders, defeated the lien — no note or security having been taken, and it being clear that in neither case was it the intention to give exclusive credit to the builders personally. *The Nestor*, 1 Sumner, 73. *The Chusan*, 2 Story, 455. *The Guy*, 9 Wall. 758. *The Patapsco*, 13 Wall. 329. *Jones* v. *Keen*, 115 Mass. 182.

3. The St. of 1855, *c.* 231, § 2, does not (like the St. 1851, *c* 843, § 2, under which the case of *Lynch* v. *Cronan*, 6 Gray, 531,

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was decided) require the certificate filed by the petitioner to contain "a just and true account of the demand justly due him," but "of the demand claimed to be due him;" and more nearly corresponds to the provisions of later statutes, by which inaccuracies in the certificate do not invalidate the proceedings unless it appears that the petitioner has wilfully and knowingly claimed more than is due to him. St. 1855, *c.* 231, § 3. Gen. Sts. *c.* 150, § 6; *c.* 151, §§ 13, 14. *Hubbard* v. *Brown*, 8 Allen, 590. *Story* v. *Buffum*, 8 Allen, 35, 37. *Jones* v. *Keen*, 115 Mass. 181.

It follows that these proceedings were not invalidated by the including in the certificates, in two of the cases, of a claim for the portion of lumber not actually used in the construction of the ship, and which we have therefore held not to be covered by the lien, but which was supplied under each petitioner's contract in relation to this ship, and to which he might well believe that his lien extended; nor by the merely clerical error in the certificates, in the other case, in adding up the items of the account, which themselves clearly show the amount of the demand claimed and actually due.

4. The same section provides that the certificate shall be filed "within four days from the time such ship or vessel shall depart from the port at which she was when the debt was contracted in the office of the clerk of the city or town within which such ship or vessel was at the time the debt was contracted."

For purposes of the customs, pilotage and navigation, the port of Boston is not limited to the municipal limits of the city of Boston, but includes the opposite shore of Chelsea. U. S. St. 1850, *c.* 79, § 13. Gen. Sts. *c.* 52, § 28. *Martin* v. *Hilton*, 9 Met. 371. The taking of the vessel in an unfinished state from one part of the port to another was not a departure from port in any sense, and the ship did not "depart from the port at which she was when the debt was contracted," until she sailed upon her voyage.

5. The provision that the certificate shall be filed "within four days from the time" of her departure, allows it to be filed at any time before the expiration of the four days. Whether it was filed before or after the beginning of the four days is immaterial.

The certificates filed by the petitioners were therefore all that the statute required.

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6. The statute provides that the lien shall continue until the debt is satisfied. St. 1855, *c.* 231, § 1. Gen. Sts. *c.* 151, § 12. These petitions, having been filed upon the first return of the ship within the jurisdiction of the Commonwealth, were seasonably instituted. *Foster* v. *The Richard Busteed*, 100 Mass. 409.

7. The extent of the lien depends upon the terms of the statute which creates it. In each of these cases, interest was not due as part of the debt under the original contract between the petitioners and the builders, and can only be claimed as damages for the neglect to pay. Such damages are not mentioned in the statute, and form no part of the claim secured by the lien against the ship and her owners. Interest is therefore to be computed only from the filing of these petitions, being the first lawful demands for the enforcement of the liens against the vessel. *Barstow* v. *Robinson*, 2 Allen, 605. It was held in that case that interest could not be computed, in a petition against the vessel to enforce the lien, from the time of a previous demand, although, as appears by referring to the original bill of exceptions, such demand had been made upon those who then were, and at the time of filing the petition continued to be, the owners of the ship, and although the contractors to whom the goods were furnished had expressly promised to pay interest. The unsuccessful attempt to invoke the jurisdiction of the federal courts can have no greater effect in this respect than a demand in the country upon the parties interested.

In the matter of interest, the practice of courts of admiralty, in the exercise of the discretion incident to their general jurisdiction, can afford no guide to a court of common law, administering a new remedy conferred and limited by express statute. But it may be doubted whether even a court of admiralty would allow interest before the commencement of the suit in such a case as those now before us. See *The Isaac Newton*, Abbott Adm. 588.

Exceptions sustained.

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SAMUEL RICE *vs.* MICHAEL ENWRIGHT & another.

Suffolk. November 11. — 27, 1875. ENDICOTT, J., absent.

Under an answer, to a declaration for rent due under a written lease, containing a general denial and alleging in avoidance that the plaintiff knowingly let the premises to be used for the illegal keeping and sale of intoxicating liquors, the defendant is not entitled to an instruction that if the plaintiff, after the letting, knowingly permitted the premises to be used for the purpose of illegally selling intoxicating liquors, or if after notice of that fact he permitted the defendant to use them for that purpose, he cannot recover.

MORTON, J. This is an action to recover rent due under a written lease. The answer contains a general denial of the plaintiff's allegations, and sets up in avoidance that the plaintiff knowingly let the premises to be used for the illegal keeping and sale of intoxicating liquors.

At the trial the execution of the lease and the defendants' occupation under it were admitted, and the court correctly held that the only issue for the jury under the pleadings was, whether the plaintiff had knowingly let the premises to be used for the illegal keeping or sale of intoxicating liquors.

Evidence that the defendants used the premises for the illegal sale of intoxicating liquors during their tenancy, and that this was known to the plaintiff, was introduced without objection as bearing upon this issue; and the defendants asked the court to instruct the jury that if the plaintiff, after the letting, knowingly permitted the premises to be used for the purpose of illegally selling intoxicating liquors, or if after notice of that fact he permitted the defendants to use them for that purpose, he cannot recover. The court refused this ruling, and the defendant excepted. Without considering whether the facts upon which the requested instruction is founded would be a defence if properly pleaded, it is sufficient for the decision of this case that they were not alleged in the answer. The instruction requested raises an issue which was not presented by the pleadings, and was therefore properly refused. It is well settled, that to give a defendant the right to avoid his contract for illegality, even in its inception or consideration, such illegality must be specified in his answer.

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Granger v. *Ilsley*, 2 Gray, 521. *Bradford* v. *Tinkham*, 6 Gray 494. *Goss* v. *Austin*, 11 Allen, 525. *Exceptions overruled.*

C. W. Bartlett, for the defendants.

T. S. Dame, for the plaintiff.

HARRIET B. HARDING *vs.* HENRY C. PRATT.

Suffolk. November 15. — 27, 1875. COLT, J., absent.

Where a declaration contains two counts for different causes of action, and the jury are instructed to return a verdict upon both, but return a verdict upon one only and the cause of action set forth in the other count is not determined by further trial, discontinuance or otherwise, the whole case is not finally disposed of, and exceptions to a ruling of the Superior Court cannot be entered in this court.

CONTRACT upon two counts: the first for moneys expended at the defendant's request upon premises leased to him by the plaintiff; and the second for use and occupation. Answer, to the first count, a general denial, and to the second count, payment of a part of the claim and tender of the rest.

The causes of action set forth in the two counts were separate and distinct, and at the trial in the Superior Court evidence was offered by the plaintiff and by the defendant upon both counts, the part payment set up in the answer to the second count was admitted, and the only question under that count was upon the tender.

The jury were instructed to return a verdict upon both counts; but returned a verdict for the defendant upon the second count only, and did not agree and brought in no verdict upon the first count.

The plaintiff moved to set aside the verdict, because it was upon one count alone and did not cover the issues presented to the jury. *Allen*, J., overruled the motion; and the plaintiff alleged exceptions.

B. W. Harris & P. E. Tucker, for the plaintiff.

J. L. Eldridge, for the defendant.

GRAY, C. J. A verdict having been rendered upon one only of the two counts upon which issue had been joined, and the

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cause of action set forth in the other count not having been determined by further trial, discontinuance or otherwise, the whole case was not finally disposed of in the court below, and these exceptions have been prematurely entered in this court. *Safford* v. *Knight*, 117 Mass. 281. *Hall* v. *Briggs*, 18 Pick. 503. *Sutton* v. *Dana*, 1 Met. 383. *Exceptions dismissed.*

GEORGE W. CHIPMAN *vs.* GEORGE E. FOSTER & others.

Suffolk. November 19. — 27, 1875. COLT, J., absent.

A draft headed "New England Agency of the Pennsylvania Fire Insurance Company," having the words "Foster & Cole, General Agents for the New England States" printed in the margin, and appearing on its face to be drawn upon said insurance company in payment of a claim against it, is the draft of the company, and not of Foster & Cole, although it is signed by them in their own names.

CONTRACT upon a draft indorsed in blank by the payees, of which the following is a copy:

Foster & Cole, General Agents for the New England States, 15 Devonshire Street, Boston.

"No 176. $5000.

"New England Agency of the Pennsylvania Fire Insurance Company, Philadelphia.

"Boston, August 18, 1873.

"Pay to the order of Haley, Morse & Company five thousand dollars, being in full of all claims and demands against said company for loss and damage by fire on the 30th day of May 1873, to property insured under policy No. 824 of Boston, Mass., agency. Foster & Cole.

"To the Pennsylvania Fire Insurance Company, Philadelphia."

There were also counts on two other drafts of the same tenor, differing only in the number of the policy, and which were indorsed in like manner.

At the trial in this court, *Ames*, J., withdrew the case from the jury, and reported it for the consideration of the full court, in substance as follows:

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The defendants were the general agents for the New England States for the Pennsylvania Insurance Company of Philadelphia.

Haley, Morse & Company held three policies of insurance issued by said insurance company in August and October, 1872, for one year, from its agency in Boston, upon their stock of furniture contained in their store.

A fire occurred on May 30, 1873, during the continuance of the policies, by which the furniture insured was destroyed. Haley, Morse & Co. made claim on the insurance company for the loss, through the defendants, and made and delivered to them three formal proofs of loss on June 18, 1873. On or about August 18, 1873, Haley, Morse & Co. called on the defendants, who then delivered to them the three drafts sued upon. These drafts were indorsed by Haley, Morse & Co., and deposited by them in a bank for collection, on August 18, 1873, and the amount thereof was passed to the credit of Haley, Morse & Co., and by the bank forwarded to Philadelphia for collection. The insurance company on presentment declined to pay the amount of the drafts, or any portion thereof, and they were protested and returned at once to the bank with protests attached, and the bank promptly notified Haley, Morse & Co. of the fact. The plaintiff, at the request and for the accommodation of Haley, Morse & Co., paid the money to the bank and received the instruments declared on from the bank, with the protests annexed.

The defendants contended that the action could not be maintained on the ground that the instruments were executed by them as agents merely, and that there was not any personal liability on their part, whether in the hands of a *bonâ fide* holder or not.

If the plaintiff was not entitled to recover upon these facts, judgment was to be for the defendants; otherwise judgment for the plaintiff.

H. D. Hyde & M. F. Dickinson, Jr., for the plaintiff.

C. T. Russell & C. T. Russell, Jr., for the defendants.

GRAY, C. J. Each of these drafts, upon its face, purports to be issued by the New England agency of the Pennsylvania Fire Insurance Company, and shows that Foster & Cole are the general agents of that corporation for the New England States, as well as that the draft is drawn in payment of a claim against the corporation. It thus appears that Foster & Cole, in drawing it,

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acted only as agents of the corporation, as clearly as if they had repeated words expressing their agency after their signature; and they cannot be held personally liable as drawers thereof. *Carpenter* v. *Farnsworth*, 106 Mass. 561, and cases cited.

Judgment for the defendants.

WILLIAM F. HOMER & others *vs.* A. H. SINNOTT & another.

Suffolk. November 11. — 29, 1875. ENDICOTT, J., absent.

Under the Gen. Sts. *c.* 124, § 13, one who is arrested on an execution in favor of a creditor, who does not reside or have a place of business in the county where the arrest is made, and who has no agent or attorney therein, may give notice of his intention to take the poor debtor's oath to the officer making the arrest; and the time for travel is to be determined by the distance between the place of service on the officer and the place of examination; and not by the distance at which the creditor or his attorney resides or does business therefrom.

CONTRACT on a recognizance entered into under the Gen. Sts. *c.* 124, § 10, by A. H. Sinnott as principal, and the other defendant as surety, and conditioned that Sinnott, who had been arrested on an execution in favor of the plaintiff, should, within thirty days from the day of his arrest, deliver himself up for examination before some magistrate authorized to act, giving notice of the time and place thereof in the manner provided by law, and appear at the time and place fixed for his examination, and from time to time until the same was concluded, and not depart without leave of the magistrate, making no default at any time fixed for his examination, and abide the final order of the magistrate thereon. The case was submitted to the Superior Court, and, after judgment for the defendants, to this court, on appeal, on an agreed statement of facts, in substance as follows:

On November 7, 1874, Sinnott was duly arrested by a deputy sheriff, at Worcester, in the county of Worcester, on an execution duly issued from the clerk's office of the Superior Court of Suffolk County upon a judgment obtained by the plaintiffs against him for the sum of $219. The officer took the debtor before a master in chancery for said county, before whom Sinnott entered into the recognizance in suit. Neither of the plaintiffs, or their

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attorney, resided or had a usual place of business in Worcester County, and they had no agent in said county. No notice was served upon the plaintiffs, or their attorney, who resided in Middlesex County, and had their usual places of business in Suffolk County, but notice was served upon the officer, who made the arrest, at half-past nine in the forenoon, on the last of the thirty days, notifying the plaintiffs that Sinnott desired to take the oath for the relief of poor debtors, and that the time and place for the examination was at eleven o'clock on the forenoon of that day, at the office of the said master in chancery, in Worcester. At the time the notice was served on the officer he was within ten rods of the place appointed for the examination. No one appearing for the plaintiffs, at the time appointed for the examination, Sinnott was discharged.

J. H. Hardy, for the plaintiffs, contended that the notice was insufficient, as no time was allowed for travel, commensurate to the distance between the place of the examination and the place of residence or business of the plaintiffs and their attorney, and cited *Way* v. *Carlisle*, 13 Allen, 398; *Smith* v. *Randall*, 1 Allen, 456; *City Bank* v. *Fullerton*, 11 Met. 73; *Jacot* v. *Wyatt*, 10 Gray, 236.

G. F. Verry & F. A. Gaskill, for the defendants.

DEVENS, J. Neither the plaintiffs, nor any agent or attorney for them, residing in the county of Worcester, or having any usual place of business therein, service of the notice of intention to take the poor debtor's oath was properly made upon the officer who had arrested the debtor; and unless a longer time previously to the examination is necessary where notice is thus served than would have been required if service had been made at the same time and place upon the plaintiffs or their attorney, the service was also in these respects sufficient. Gen. Sts. *c.* 124, § 13. *Jacot* v. *Wyatt*, 10 Gray, 236.

While the allowance of time is fixed by the clause of *c.* 124, § 13, which provides for service of the notice upon the plaintiff, his agent or attorney, and there is no express direction in reference to it in the clause in which provision is made for service upon the officer, the reasonable interpretation of the statute is that in such case the time is to be computed as in the case of service upon a plaintiff or his attorney. Unless this is so, no

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rule whatever has been given, and we should be left to determine, without any guide from the provisions of the statute, whether the time of service of the notice should be, as the plaintiffs contend, such as would enable the officer to communicate with the plaintiffs and for them to reach the place of examination, or whether it should be computed from the place of residence of the plaintiffs, or that of their attorney, or from the place of business of one or the other. If either of such rules were adopted, the delay which the statute intended to avoid would inevitably occur where the plaintiff or his attorney resides in a remote county, and the speedy hearing to which the debtor is entitled would not be afforded him. If the plaintiff has arrested any person out of the county in which he or his attorney resides, or has his place of business, he can always secure sufficient notice to a person properly instructed by employing an agent or attorney therein who may appear and contest the discharge of the debtor; but, if he does not do this, the examination is not therefore to be delayed.

The notice served upon the officer is not for the purpose of enabling him to appear and contest the discharge of the debtor, nor is he under any legal duty to communicate with the plaintiff or his attorney, when such notice is served upon him, to enable them to do so. It is the duty of the creditor to have an officer at the place of examination, in case he shall desire to have the debtor rearrested, and should his discharge be refused him. *Stone* v. *Russell*, 11 Gray, 226. The notice served upon the officer enables him, if so instructed by the creditor, to be present at the place of the examination, and to rearrest the debtor, if the magistrate refuses to discharge him, and makes a certificate to that effect upon the execution. It might easily happen that the creditor would desire to be prepared for the contingency of a refusal by the magistrate to grant the discharge, even if he should not desire to incur the expense of contesting it in person or by attorney. *Judgment for the defendants.*

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JOHN NORTON & others *vs.* CITY OF BOSTON & another.

Suffolk. November 18. — 29, 1875. COLT, J., absent.

Where a town is annexed to a city by a statute which entitles the city to receive all uncollected taxes, and makes it liable for all the debts and obligations of the town, this court has no jurisdiction in equity to restrain the city from selling land to pay a betterment tax illegally assessed thereon; the landowner having a plain, adequate and complete remedy at law.

BILL IN EQUITY, filed March 6, 1875, against the city of Boston and Michael Norton, to restrain a sale of certain land of the plaintiffs in Brighton, for nonpayment of a betterment tax assessed thereon for the widening of Market Street in Brighton before the annexation of that town to the city of Boston.

The bill alleged that Market Street was not a town way or private way but a county way, which the town of Brighton had no legal power or right to widen, and for the expenses of widening which the town could not assess betterments; and that the defendant Norton, describing himself as "treasurer and collector of the late town of Brighton," had advertised the land for sale in payment of the tax.

The defendants demurred to the bill on the ground that the plaintiffs had a plain, adequate and complete remedy at law. *Devens*, J., sustained the demurrer; and the plaintiffs appealed.

G. H. Kingsbury, for the plaintiffs.

J. P. Healy & H. W. Putnam, for the defendants.

ENDICOTT, J. The plaintiffs seek to restrain the defendants from selling their land for a betterment tax, assessed for the widening of Market Street in Brighton before the annexation of that town to Boston. By the act of annexation, St. 1873, *c.* 303, § 2, Boston is entitled to receive all uncollected taxes, and is subject to and liable for all the debts and obligations of the town of Brighton. The plaintiffs contend that Brighton had no authority to assess the tax upon their land, because Market Street was a highway, and that Boston has the right to collect only legal taxes under the act.

Assuming that the tax was illegal as alleged in the bill, there is no lien on the land, and the sale would pass no title; and if the plaintiffs should pay the betterment, their remedy at law

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would be complete. It has been repeatedly held that there is no cause to resort to a court of equity, because the plaintiff is put to the inconvenience of paying a tax under protest, and then bringing an action to recover it because illegal. The prompt and immediate payment of taxes for the support of the government is of the first importance, and the right to recover them back, if illegally assessed, is an adequate remedy. It was directly held in *Hunnewell* v. *Charlestown*, 106 Mass. 350, that this court had no jurisdiction in equity to restrain the defendant from selling land which it had illegally assessed for a betterment, but the plaintiff must seek his remedy at law. See also *Brewer* v. *Springfield*, 97 Mass. 152; *Loud* v. *Charlestown*, 99 Mass. 208; *Whiting* v. *Mayor & Aldermen of Boston*, 106 Mass. 89, 93.

No distinction can be made in this case because the authorities of Boston did not lay the tax which the defendants are attempting to collect. Boston succeeds by the act of annexation to the rights and obligations of Brighton, and the plaintiffs have the same remedy against Boston which they would have had against Brighton, if that town had not been annexed and had endeavored to enforce this tax. *Stone* v. *Charlestown*, 114 Mass. 214, 224.

Demurrer sustained, and bill dismissed.

COMMONWEALTH *vs.* JOHN HOLMES.

Bristol. Oct. 26. — Nov. 29, 1875. MORTON, J., absent.

Where a count in an indictment charges two offences precisely alike, the fault is cured by the election of the prosecutor to proceed upon one charge only, and his entering a *nolle prosequi* as to the others.

Irregularity in the proceedings upon a complaint in a District Court is no ground for dismissing the complaint on appeal.

At the trial, on appeal from a District Court, of a complaint for a sale of intoxicating liquors, in which the prosecution enters a *nolle prosequi* as to all the offences charged except one, and a conviction is had upon that one, the presumption, in the absence of evidence to the contrary, is that the conviction in the District Court was for the same offence.

At the trial of a complaint for the sale by the defendant of intoxicating liquors in violation of law, evidence that the defendant's son sold intoxicating liquors to the person named in the complaint in a public house kept by the defendant, and in which his son was clerk, is sufficient evidence to be submitted to the jury of a sale by the defendant, and to warrant a conviction.

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COMPLAINT to the First District Court of Bristol, alleging that the defendant, at Mansfield, on August 14, 1875, "unlawfully did sell to one William Tilson, also to one William G. Tufts, also to one Curtis M. Brown, also to one Charles James, also to one Alden Fuller, also to one Willard A. White, also to one Enos L. Williams, also to one Harvey H. Barrows, intoxicating liquor, he the said John Holmes not having then and there any license, authority or appointment according to law to make such sale, against the peace of said Commonwealth and contrary to the form of the statute in such case made and provided."

The defendant moved to quash the complaint on the following ground: "More than two separate and distinct offences are set forth in the same count in the complaint. Two or more counts describing different offences are set forth in the same complaint, not depending upon the same facts or transactions, and there is no averment that they are different descriptions of the same act."

This motion was overruled, the defendant was tried and found guilty, and appealed to the Superior Court.

The record of the District Court, after reciting the allegations of the complaint, and stating that the defendant pleaded not guilty, proceeded as follows: "And now, after a full hearing and examination in said case, it appears to said court that said John Holmes is guilty. It is therefore considered and ordered by said court that said defendant, for the offence aforesaid, pay a fine of fifty dollars to the use of the county of Bristol, and costs of prosecution taxed at eighteen dollars and five cents, and that he stand committed until said sentence be performed. From which sentence the said John Holmes appeals to the Superior Court, next to be holden at Taunton, within and for the county of Bristol, on the second Monday of September next, and recognizes with sufficient sureties in the sum of two hundred dollars to prosecute said appeal there, as the law directs."

At the trial in the Superior Court, before *Wilkinson*, J., the district attorney entered a *nolle prosequi* as to all the allegations in the complaint of sales to other persons than White, and the defendant was tried only upon the allegations of the sale to White.

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Willard A. White testified that, about the middle of May, 1875, in a room in the defendant's house, he bought whiskey of the defendant's son, John B. Holmes, and paid him for it; that one Weaver and one other person was present, and they all drank a glass together.

Weaver testified that he was present on the occasion, testified to by White, and had some liquor with him, which was delivered to them by the defendant's son, but he did not know whether it was paid for or not. Both witnesses testified that they saw nothing of the defendant in or about the premises on that day.

Jacob A. Blake, a deputy sheriff, living in Mansfield near the defendant, testified that the house, where the sale testified to was made, was a public house known as the Eagle Hotel, and kept by the defendant; that there was a sign in front of the house in which were the words "Eagle Hotel, John Holmes;" that in a newspaper at Mansfield he had seen an advertisement of the hotel, in which among other things were the words, "Eagle Hotel, John Holmes, proprietor. John B. Holmes, clerk."

The defendant testified that he was the proprietor of the hotel, that he did not sell or keep liquor for sale, that he had no knowledge of the transaction testified to by White, and if it occurred it was without his authority or consent; that he had liquor in that room; that it belonged to him; that he had it for his own use; that he occasionally treated his friends or guests, but never sold or authorized any one to sell it. On cross-examination, he testified that his son, who was about twenty years of age, acted as clerk, and delivered to him the money received by him at the hotel; but on examination by his counsel, testified that he never delivered to him money which was the proceeds of the sale of liquor, and he had no knowledge of his selling any.

The defendant requested the judge to rule and instruct the jury that this evidence was not sufficient to warrant a conviction. The judge refused so to rule, and the case was submitted to the jury under instructions not excepted to, except as above, and a verdict of guilty was returned.

The defendant then filed a motion to set aside the verdict, on the ground that "the verdict was not warranted by the evidence, and was against the weight of the evidence, and not warranted by law upon the record." This motion was overruled.

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The motion to quash the complaint was renewed in the Superior Court, and was overruled; and the defendant filed a motion in arrest of judgment, on the following grounds:

"Because his motion to quash, regularly filed in the court below and made a part of this motion, was overruled by this court after the district attorney had entered a *nolle prosequi* as to all the allegations of sale to the several persons named in the complaint except as to the sale alleged to have been made to Willard A. White; and he says that it does not appear from the record of judgment of the court below which is made a part hereof, that he was in said court convicted of the offence of making a sale to Willard A. White, or to which of the several persons named in said complaint to whom he is alleged to have made a sale of liquor he was convicted of making a sale, neither does the complaint allege a joint sale. And that, therefore, the record as it stood did not warrant a trial upon the question of a sale to Willard A. White alone, it not appearing by the record what particular sale or sales he was convicted of making, and from a conviction on which he had appealed.

"Because said record of judgment from the court below is irregular and insufficient to show for which or on what offence he was convicted in the court below, and would not warrant a confining of the evidence to that particular act alone, and because his said motion to quash should have been allowed."

This motion was overruled; and the defendant alleged exceptions.

J. Brown, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

GRAY, C. J. When one count in an indictment charges two offences, distinct in kind and requiring distinct punishments, the objection of duplicity has been allowed in arrest of judgment. *Commonwealth* v. *Symonds*, 2 Mass. 163. *State* v. *Nelson*, 8 N. H. 163. *People* v. *Wright*, 9 Wend. 193. But when the two offences are precisely alike, the only reason against joining them in one count is that it subjects the accused to confusion and embarrassment in his defence; the objection is not open after a verdict of guilty of one offence only, but must be taken by motion to quash, or to compel the prosecutor to confine himself to one of the charges; and the fault is cured by his electing to pro-

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ceed upon one charge only, and entering a *nolle prosequi* as to the others. *Commonwealth* v. *Tuck*, 20 Pick. 356, 361, 362. *Commonwealth* v. *Cain*, 102 Mass. 487. *State* v. *Merrill*, 44 N. H. 624.

The appeal from the judgment of the District Court vacated that judgment, and rendered immaterial the overruling of the motion to quash in that court and all other errors and irregularities in the proceedings there. *Commonwealth* v. *Harvey*, 111 Mass. 420. *Commonwealth* v. *Calhane*, 108 Mass. 431. *Commonwealth* v. *Sheehan*, 108 Mass. 432 note. In the Superior Court, the district attorney entered a *nolle prosequi* as to all the offences charged, except the sale to White, and the defendant was tried for that offence only. The presumption, in the absence of evidence to the contrary, is that his conviction in the District Court was for the same offence. *Commonwealth* v. *Fields*, *ante*, 105, and cases cited.

The evidence that the defendant's son sold intoxicating liquors to White in a public house kept by the defendant, and in which his son was clerk, was sufficient evidence to be submitted to the jury of a sale by the defendant through his son as his agent, and to warrant a conviction. *Exceptions overruled.*

COMMONWEALTH *vs.* WILLIAM FREDERICKS.

Suffolk. November 22. — 27, 1875. COLT, J., absent.

A complaint on the St. of 1875, c. 99, which charges the defendant with unlawfully selling intoxicating liquors, "not being then and there authorized to sell the same in said Commonwealth under the provisions of" that chapter, "or by any legal authority whatever," sufficiently negatives all authority of the defendant to sell intoxicating liquors, whether derived from the statute or from any other source.

The misnomer, in a complaint, of the defendant, which is not apparent on the record, cannot be availed of by motion to dismiss, but only by plea in abatement.

The record of the judgment of a Municipal Court, transmitted to the Superior Court on appeal, stated that A. was brought before the court on the complaint of B. setting forth that A. was guilty of the crime of unlawfully selling intoxicating liquors, ("as is more fully set forth in said complaint.") Annexed to the record of the judgment was a copy of the complaint, both papers being signed by the name of the clerk of the Municipal Court, with the addition of the word "Clerk,"

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and both being attested by him as true copies. *Held*, that no error appeared upon the papers.

Irregularity in the proceedings upon a complaint in a Municipal Court is no ground for dismissing the complaint on appeal.

The St. of 1875, c. 99, authorizing the granting of licenses by the municipal authorities to sell spirituous and intoxicating liquors and requiring the payment of a fee or excise therefor, is constitutional.

COMPLAINT under the St. of 1875, *c.* 99, to the Municipal Court of the Charlestown District, by J. B. Cotton, charging William Fredericks with unlawfully selling intoxicating liquors in said district, on August 10, 1875, "to a person whose name is to your complainant unknown, he, the said Fredericks, not being then and there authorized to sell the same in said Commonwealth for any purpose under the provisions of chapter ninety-nine of the acts of the year eighteen hundred and seventy-five of this Commonwealth, or by any legal authority whatever; against the peace of said Commonwealth, and the form of the statute in such case made and provided."

In the Municipal Court the defendant moved to dismiss the complaint on the following grounds:

"1. The complaint is insufficient, and does not set forth any offence known to the law.

"2. It does not appear by any allegation that the defendant is not of the class of persons excepted under the provisions of the St. of 1875, *c.* 99, or that the intoxicating liquors that he is charged with selling are not of the kind permitted to be kept and sold without a license.

"3. The statute under which the complaint is brought is unconstitutional and void.

"4. The complaint charges William Fredericks with selling intoxicating liquors in violation of law; whereas the defendant's name is William A. Fredericks." This motion was overruled.

The defendant was tried, adjudged guilty and sentenced to pay a fine of $100 and costs, and appealed to the Superior Court. The record of the judgment of the Municipal Court, transmitted to the Superior Court, recited that the defendant was brought before the court on the complaint of J. B. Cotton, setting forth that "he the said Fredericks, on the tenth day of August eighteen hundred and seventy-five, at Boston aforesaid, and in said Charlestown District, was guilty of the crime of unlawfully selling in-

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toxicating liquors, (as is more fully set forth in said complaint,)" and the record then proceeded in the usual manner. Annexed to the record was a copy of the complaint, signed "Daniel Williams, Clerk." The copy of the record was signed "Stephen P. Kelley, Clerk, *pro tem.;*" and both papers were certified to be true copies by "Daniel Williams, Clerk."

In the Superior Court, before *Bacon*, J., the defendant moved to dismiss the proceedings on the following grounds:

"1. There is no description, in the papers transmitted to this court, of any offence known to the law of the land.

"2. There is no copy of any conviction of the defendant upon any offence at law, or in proper judgment of the court appealed from, on any issue transmitted to this court, by the justice of the Municipal Court for the Charlestown District, or by the clerk thereof.

"3. The papers transmitted to this court are insufficient, and no judgment can be rendered upon them in this court.

"4. The proceedings of the court appealed from, and the record of its proceedings in this case as transmitted, are irregular, informal and defective, as appears of record in this court."

This motion was overruled; and the judge ruled that the copy of the complaint referred to in the judgment was a part of the record, and that upon the offence stated therein and in the judgment the defendant was to be tried.

The defendant then, and before the jury were empanelled, renewed his motion, made in the Municipal Court, to dismiss the complaint. This motion was also overruled, and the defendant was then tried.

The evidence introduced tended to show the sale, as alleged in the complaint, of a pint of whiskey, by the defendant, to a man whose name was unknown. No other testimony was offered.

The defendant asked the judge to rule as follows: "1. That, upon the proceedings transmitted to this court, there was no offence, stated in proper legal terms, upon which the jury could find a verdict, or the court record a judgment. 2. That, under this complaint and judgment, there was no evidence to go to the jury to warrant a conviction." The judge declined so to rule as requested, and did rule that the offence was sufficiently alleged; that the proceedings transmitted were sufficient, and the evidence

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introduced by the government, if the jury believed it, would warrant a verdict of guilty. The jury returned a verdict of guilty.

The defendant filed a motion in arrest of judgment on the following grounds:

"1. There is no description in the complaint, judgment, or any of the papers transmitted to this court, of any offence known to the law of the land.

"2. There is no copy of any conviction of the defendant upon any offence at law, or any proper judgment of the court appealed from, or any issue raised there, transmitted to this court by the justice of the Municipal Court of the Charlestown District, or by the clerk thereof.

"3. The proceedings of the court appealed from, and the record of its proceedings in this case transmitted to this court, as appears of record, are irregular, informal and defective; so that no judgment ought to be rendered thereon.

"4. The law, for the violation of which the defendant has been convicted, is unconstitutional and void." This motion was overruled, and the defendant alleged exceptions.

G. W. Searle & J. W. Mahan, for the defendant. 1. The court erred in overruling the motions to dismiss and in arrest. The second motion was seasonably made, and is to be presumed to have been received and acted on without objection on the score of time of filing. The complaint is insufficient, indefinite, and, in due form, charges no crime. The St. of 1875, *c.* 99, § 1, is not a general prohibitory law, but with exceptions distinctly expressed; it does not apply to sales of cider or native wines by the makers, or to sales by law. There can be no correct charge of an offence, which does not negative these exceptions, even though the exception is in the same section as the enactment. Where the exception constitutes an absolute ingredient, its denial must be distinctly averred. The general terms of the denial do not reach or cure the difficulty. They were manifestly intended only to negative the statutory words, or to apply to a defendant's liability to prove a license.

2. The motion in arrest should have been granted.

3. The St. of 1875, *c.* 99, is unconstitutional and void, both in its general outline and in its detail. There is no lawful authority to punish the vices of men, or to regulate trade and business

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which are supposed to encourage vices. It is only when vices culminate in crimes that they can be made criminal, and their aiders regulated and controlled. The statute does not define what shall constitute criminal offences under it, or what shall be the nature or extent of punishments, and is uncertain and indefinite in its penalties. The fees are uncertain, not fixed by the Legislature, and the revenue of the state is left to the discretion of a municipal corporation, or of a body created by it. All criminal laws to be valid must be positive as to enactment, and uniform as to operation on all persons, and in all localities. There is no lawful authority for the legislator to divide his responsibility with his constituency, still less with a local portion of it. There has been no adjudication in this state sustaining this act. The law is unconstitutional, because the Legislature is the law-making power by the Constitution of the state, and cannot delegate its functions to the mayor and aldermen of cities, or the selectmen of towns, or to a board of commissioners. The complaint in all cases is in the name of the Commonwealth and for the violation of the law of the Commonwealth, and must, in order to constitute a crime, be universal in its application to the citizens of the Commonwealth. A certain act of one of its citizens cannot be made a crime and so punished by fine and imprisonment in one city or town, while the same act by the same citizen is made legal in another city or town. The law delegates to the mayor and aldermen of cities and selectmen of towns, or to a board of commissioners, a power strictly confined to the Legislature by the Constitution.

Section 6 of the law is ambiguous, vague and uncertain in its tenor and meaning; it says that each license shall be "expressed to be" subject to certain conditions, and not that it shall be subject to such specific conditions — thereby implying that the license shall be said to be subject, while really it is not subject, to those specific conditions.

Section 13 provides that any person convicted of a violation of any of the provisions of his license, or of this act, shall be punished. This is too vague, as there is no provision of this act specially referred to; and to state generally that a person convicted of a violation of any of the provisions of the act shall be punished is uncertain, as the offence must be clearly set out for which a punishment is provided.

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The provisions which are ambiguous and uncertain are so frequent that only a few are referred to. Section 6 provides that no spirituous or intoxicating liquors, except those the sale of which is allowed by the license, shall be kept on the premises described in the license. Is this to be construed to mean, that each license shall specify in quality and kind the specific liquors to be kept; or generally, that brandy, whiskey, &c., shall not be kept unless the license gives the right to do so? Section 1 provides that no person shall sell or export or keep for sale. Which provision of law is violated if a person is found to have on his premises certain spirituous and intoxicating liquors, but no specific allegation is made, in the complaint, of sale or exposure for sale? Section 6 also provides that the licensee shall not keep a public bar, and shall hold a license as innholder or common victualler. What is a public bar? And what is a private bar? Can the court judicially take notice of the meaning of the term "a public bar"? The act says, "shall hold a license as an innholder or common victualler." From whom? And, if a person holds a license as either for 1875 or a part of the year, why is not that sufficient under the law? And who is to grant this license which the licensee is to hold? A forfeiture is also provided for under the law. Which punishment is to take place, or both? The law in its entirety is a law inoperative and void, and contrary to the Constitution and the Declaration of Rights. See *State* v. *Weir*, 33 Iowa, 134; *Santo* v. *State*, 2 Iowa, 165, 203; *Geebrick* v. *State*, 5 Iowa, 491; *Ex parte Wall*, 48 Cal. 279; *Parker* v. *Commonwealth*, 6 Penn. St. 507.

C. R. Train, Attorney General, for the Commonwealth.

GRAY, C. J. There is no plausible ground for sustaining any of the exceptions taken and argued in this case.

1. The complaint distinctly and sufficiently negatives all authority of the defendant to sell intoxicating liquors, whether derived from the St. of 1875, *c.* 99, or from any other source. *Commonwealth* v. *Lafontaine*, 3 Gray, 479. *Commonwealth* v. *Gilland*, 9 Gray, 8. *Commonwealth* v. *Dunn*, 14 Gray, 401. *Commonwealth* v. *Costello*, 118 Mass. 454.

2. The alleged misnomer of the defendant, not being apparent on the record, cannot be availed of by motion to dismiss, but only by plea in abatement. *Commonwealth* v. *Dedham*, 16 Mass. 141

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146. *Turns* v. *Commonwealth*, 6 Met. 224. *Crosby* v. *Harrison*, 116 Mass. 114.

3. No errors in the copies transmitted from the Municipal Court are pointed out in the motions or brief of the defendant, or are apparent upon the papers before us.

4. Any irregularities in the proceedings in the Municipal Court were rendered immaterial by the appeal which vacated the judgment of that court. *Commonwealth* v. *Holmes*, *ante*, 195.

5. The St. of 1875, *c.* 99, authorizing the granting of licenses by the municipal authorities to sell spirituous and intoxicating liquors, and requiring the payment of a fee or excise therefor, is constitutional and valid. *Commonwealth* v. *Blackington*, 24 Pick. 352. *Commonwealth* v. *Bennett*, 108 Mass. 27. *Commonwealth* v. *Martin*, 108 Mass. 29, note. *Commonwealth* v. *Dean*, 110 Mass. 357.

6. We perceive no ambiguity in the provisions of the statute, in any of the particulars referred to by counsel. The provision of § 6, that each license shall be subject to certain specified conditions, as well as the provisions of §§ 12, 13, for forfeiting the license upon breach of those conditions, clearly show that the license is subject to the conditions therein expressed. Section 13 prescribes the punishment for any violation of the statute. The provision of § 6, that certain classes of licenses "shall be subject to the further condition that no spirituous or intoxicating liquors, except those the sale of which is allowed by the license, shall be kept on the premises described in the license," signifies that only liquors of that kind, the sale of which is allowed by the license, shall be kept on the premises. The condition that "the licensee shall not keep a public bar," explains itself to all who read it. The further condition, that the licensee "shall hold a license as an innholder or common victualler" is shown by the very next sentence to mean such a license from the mayor and aldermen or selectmen. *Exceptions overruled.*

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COMMONWEALTH *vs.* THOMAS CURRAN.

Suffolk. November 22. — 27, 1875. COLT, J., absent.

A complaint which alleges that the defendant "unlawfully did expose and keep for sale intoxicating liquors," with intent to sell the same in this Commonwealth, charges but one offence.

Under the St. of 1864, *c.* 121, § 1, if a person charged with keeping intoxicating liquors for sale in violation of law is proved to have kept them for sale, the burden of proving that he had a license or authority so to do is upon him.

On the trial of a complaint under the statute of 1875, *c.* 99, charging the defendant with unlawfully exposing and keeping intoxicating liquors with intent to sell the same in this Commonwealth, the defendant requested an instruction to the jury that the burden of proof was on the government to prove that the liquors exposed and kept for sale were intoxicating, and that the jury must acquit if the evidence left them in doubt as to that fact. The judge gave this instruction with the modification that if the liquors exposed were ale, or distilled spirits, called whiskey, they must convict, if the same were kept for sale. *Held*, that the modification was correct.

COMPLAINT under the St. of 1875, *c.* 99, to the Municipal Court of the city of Boston, averring that Thomas Curran, on July 3, 1875, "at Boston aforesaid, and within the judicial district of said court, unlawfully did expose and keep for sale intoxicating liquors, with intent unlawfully to sell the same in this Commonwealth, the said Curran not having then and there any license, authority or appointment, according to law, then and there to expose, keep for sale, or sell said liquors, against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided."

In the Superior Court, before *Bacon*, J., on appeal, before the jury were empanelled, the defendant filed a motion to quash the complaint on several grounds, the only one of which not covered by the case of *Commonwealth* v. *Fredericks*, *ante*, 199, was that "it is void for duplicity, charging two offences in one count; and the complaint does not contain any sufficient allegation or description of any offence at law, and is defective both in form and substance." This motion was overruled, and the defendant was then tried.

The government introduced evidence tending to show that the defendant kept a place of business, in which ale and other liquors were exposed and kept for sale. The defendant requested the judge to give the following instructions:

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"1. That the government has failed to prove any offence under the St. of 1875, c. 99.

"2. That the defendant was not of the class of persons permitted to expose, keep and sell intoxicating liquors without a license.

"3. The government must show that the liquors exposed and kept for sale were not liquors the defendant was required to sell under any provisions of law requiring him to sell personal property, and were not cider or native wine in his possession as the maker thereof, to be sold not to be drunk on the premises. If the government has failed to prove these facts, the jury must acquit.

"4. The burden of proof is on the government, to prove that the liquors exposed and kept for sale were intoxicating, and the jury must acquit if the evidence leaves them in doubt as to this fact.

"5. Under the present law and under this complaint it is necessary for the government to prove that the defendant did not have any authority under this law to expose, keep for sale or sell the intoxicating liquors alleged and proved to have been exposed and kept for sale.

"6. The jury must not convict upon the mere opinion of any witness, that the liquors exposed and kept for sale were ale, whiskey or other intoxicating liquors.

"7. The government must show in this case one of two things: either that the mayor and aldermen of the city of Boston voted to grant licenses under this law, or refused to do so; or that the powers and duties given to and imposed upon them were exercised by a board of license commissioners, appointed by the mayor and confirmed by the city council thereof, after the city council had so determined to delegate the power to such a board.

"8. The statute under which this complaint is made is contrary to the provisions of the Constitution."

The judge instructed the jury in accordance with the sixth request, and gave the fourth with this modification, "that if the liquors exposed were ale or distilled spirits, called whiskey, they must convict, if the same were kept for sale, and declined to give the other instructions requested."

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The jury returned a verdict of guilty; and the defendant filed a motion in arrest of judgment, alleging substantially the grounds stated in the motion to dismiss. This motion was overruled, and the defendant alleged exceptions.

G. W. Searle & J. W. Mahan, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

GRAY, C. J. Most of the exceptions in this case are disposed of by the judgment in *Commonwealth* v. *Fredericks*, *ante*, 199, and the others are equally unfounded.

1. The allegation in the complaint that the defendant did expose and keep for sale intoxicating liquors, charges but a single offence, and is not bad for duplicity. *Commonwealth* v. *Nichols*, 10 Allen, 199.

2. If the defendant was proved to have kept intoxicating liquors for sale, the burden of proving that he had a license or authority so to do was upon him. St. 1864, *c.* 121, § 1. *Commonwealth* v. *Kennedy*, 108 Mass. 292. *Commonwealth* v. *Leo*, 110 Mass. 414. *Commonwealth* v. *Shea*, 115 Mass. 102.

3. The jury were instructed, in accordance with the defendant's fourth request, that the burden of proof was on the government to prove that the liquors exposed and kept for sale were intoxicating, and that the jury must acquit if the evidence left them in doubt as to that fact. The addition made by the judge to this instruction was clearly correct; for § 18 of the St. of 1875, *c.* 99, provides that ale as well as distilled spirits shall be deemed intoxicating liquors, within the meaning of the statute.

Exceptions overruled.

COMMONWEALTH *vs.* JEREMIAH A. GREENLAW.

Suffolk. November 22. — 27, 1875. COLT, J., absent.

Under the Gen. Sts. *c.* 115, § 7, if exceptions are not presented to the presiding judge, or application made to him for an extension of the time for presenting them, before the final adjournment of the court, they cannot be allowed without the consent of the adverse party, although they are filed within three days after the verdict.

INDICTMENT for subornation of perjury. At the trial in the Superior Court, before *Bacon*, J., at July term 1875, the de-

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fendant was found guilty, and alleged exceptions to the rulings at the trial. The certificate of the judge upon the bill of exceptions was as follows:

"I have examined the foregoing bill of exceptions, and find the same to be conformable to the truth; and I allow the same, provided the Supreme Judicial Court shall be of opinion that I have a right in my discretion so to do, upon the following facts: No bill of exceptions was filed with the clerk in this case, until after the adjournment of the court without day. The verdict in this case was rendered on the last day but one of the term, and, on the next day after verdict, that being the last day of the term, a bill of exceptions was filed, but not until after the final adjournment of the court without day. The time for filing said exceptions was not extended by the court, no application therefor having been made to the court, and no memorandum in relation thereto was made upon the docket. The government did not assent that any bill of exceptions should be filed in this case."

A. R. Brown & E. A. Alger, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

GRAY, C. J. The provision of the Gen. Sts. *c.* 115, § 7, is explicit, that bills of exceptions shall be presented to the court within three days after the verdict in the case, or the ruling excepted to, and before the adjournment without day of the term at which the exceptions are taken, unless the court, for good cause shown, allows further time. Application for an extension of the time must be made before the time given by the statute has expired. In the present case, no exceptions having been presented to the presiding judge, or application made to him for an extension of the time for presenting them, until after the final adjournment of the term, he had no authority to allow them without the consent of the adverse party. *Barstow* v. *Marsh*, 4 Gray, 165. *Phillips* v. *Soule*, 6 Allen, 150. *Doherty* v. *Lincoln*, 114 Mass. 362. *Ex parte Bradstreet*, 4 Pet. 102. *United States* v. *Breitling*, 20 How. 252. *Exceptions dismissed.*

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COMMONWEALTH *vs.* DOMINGO CARDOZE.

Bristol. Oct. 26. — Dec. 4, 1875. MORTON, J., absent.

On the trial of a complaint for keeping a disorderly house, the evidence tended to show that the defendant kept a dance hall, which was resorted to by men and women of bad repute, and the government was permitted, against the defendant's objection, to introduce evidence that women of bad repute, resorting to the hall, had frequently while there solicited men to leave the building and go away with them for the purposes of prostitution; that the men went away with them, and that the defendant was then present in the hall. *Held*, it not appearing by the bill of exceptions that this was all the evidence offered at the trial, that the evidence was rightly admitted.

COMPLAINT to the Police Court of New Bedford, charging that the defendant, at a time and place mentioned, "a certain common, ill-governed and disorderly house unlawfully did keep and maintain; and in the said house for his own lucre and gain, certain evil disposed persons, as well men as women, of evil name, fame and conversation, to come together on the days and times aforesaid, there unlawfully and willingly did cause and procure; and the said persons, in the said house, at unlawful times, as well in the night as the day, on the days and times aforesaid, there to be and remain, drinking, tippling, cursing, swearing, quarrelling and otherwise misbehaving themselves, unlawfully did permit and suffer, to the great injury and common nuisance of all the peaceable citizens of said Commonwealth there residing, inhabiting and passing, and against the peace and dignity of the Commonwealth aforesaid." Trial in the Superior Court, before *Wilkinson* J., on appeal, who allowed a bill of exceptions, in substance as follows:

The evidence tended to prove that the defendant was the proprietor and keeper of a certain room or hall used by his authority as a dance hall; and which was resorted to, on the evenings when dancing was carried on therein, by women and men of bad repute. Evidence was offered by the government to prove that these women of bad repute, so resorting to said hall, had frequently while there solicited men to leave the building and go away with them for the purposes of prostitution; and that thereupon the men so solicited frequently would leave the hall in company with the women so soliciting them, and go away with

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them, the defendant being present in the hall when these acts were done. To the admission of this evidence in support of the complaint the defendant objected, but the judge ruled that the evidence so offered was admissible in support of the allegation of disorderly conduct, and admitted it. The defendant was convicted, and alleged exceptions to the admission of said evidence.

H. M. Knowlton, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

AMES, J. On a complaint of this kind, it is of course material to show the character and deportment of the persons resorting to the house in question. We cannot doubt that in such a case it would be competent for the prosecution to prove that the place was kept ostensibly as a dance hall, but really as a place of resort for notorious prostitutes, where they were to meet with dissolute men, and to make assignations and appoint meetings for purposes of prostitution. This would certainly be admissible as part of the evidence. There is nothing in the bill of exceptions to indicate that it was all the evidence offered at the trial. The habitual meeting of such persons for such purposes would inevitably tend to produce riotous and disorderly conduct. Whether such evidence standing alone would be sufficient to sustain the charge is a question not raised by these exceptions.

Exceptions overruled.

COMMONWEALTH *vs.* WILLIAM KENNEDY.

Bristol. October 26. — December 16, 1875. MORTON, J., absent.

If a married woman keeps intoxicating liquors for sale in violation of law in a house which she and her husband own jointly, the husband will be liable for such illegal keeping, if he has knowledge of the fact and of her intent, although he has no interest in the stock in trade, or in the profits.

INDICTMENT for keeping and maintaining a tenement used for the illegal sale and keeping of intoxicating liquors on August 1, 1874, and divers other days between that day and September 17, 1874.

At the trial in the Superior Court, before *Wilkinson*, J., there was evidence that certain liquors were found in a shop being a

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portion of the dwelling-house of the defendant's wife, and that the defendant was seen in the shop or place where the liquors were found; but there was no evidence of sales by the defendant or of his doing anything except being present in the shop and helping the officers to uncouple the pipe from a beer barrel and helping roll it out.

The defendant testified that the premises in question were owned by himself and wife jointly, but that he did not know how to read or write, and that his wife carried on the business of the shop on her sole and separate account, buying the articles kept in her own name, and selling them and receiving the pay and keeping the profits to her own use. The defendant's wife being called as a witness testified that the premises were owned by herself and husband, both names being in the deed, and that she on her own account carried on the business since May 1874 in the shop, buying and selling in her own name the articles in the store or shop, and that her husband, the defendant, had no interest or ownership in the things bought and sold, nor in the profits, but that they belonged to herself. On cross-examination she testified that she and her husband owned other real estate together, and on being asked by the district attorney, "Then you and your husband put your money together, do you?" she answered, "Yes, in building the other house."

It was admitted that no certificate had been filed in the city clerk's office, either by herself or husband, under the St. of 1862, c. 198.

This testimony was not controverted as to the ownership of the premises, or as to the ownership of the articles including the liquors in the shop, or as to the fact that the wife bought and sold and carried on the business in her own name.

The defendant's counsel requested the judge to instruct the jury, "that if the jury are satisfied that the place was kept and the stock owned by the wife and not by the husband, and that she was carrying on the business on her own separate account, her husband having no interest in the profits or ownership of the articles bought or sold, nor profits, the presumption of law is, unless there is an express agreement to the contrary, that the business is presumed to be on her separate account, and that herself and not her husband would be liable for the illegal keeping

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if any there was." The judge declined to give the instruction as requested, but did instruct the jury in a manner not excepted to unless the particular instruction asked for should have been given.

The defendant was found guilty, and alleged exceptions to the refusal of the judge to rule as requested.

L. Lapham, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

COLT, J. The liquors kept for illegal sale were found in a shop which was a portion of a dwelling-house owned by the defendant and his wife, who acquired title by a deed in which both were named as grantees. They were therefore both seised of the entirety, and the husband was entitled during coverture to the rents and profits. *Shaw* v. *Hearsey*, 5 Mass. 521.

The fact that the wife there carried on an illegal traffic, and that he had no interest in the stock in trade or in the profits, does not alone exempt the defendant from the charge of keeping a tenement for the illegal keeping and sale of intoxicating liquors. It was declared in *Commonwealth* v. *Barry*, 115 Mass. 146, that the statutes which give a married woman the right to carry on any trade or business on her sole and separate account, do not deprive a husband of his common law right to control his own household; that he has power to prevent his wife from using his house for an illegal business or purpose; that if he permits her to use it for the illegal business of keeping intoxicating liquors for the purpose of sale, he becomes a participator in the misdemeanor; and that the fact that she is carrying on the business on her own account does not release him from liability.

It is to be assumed in the case at bar, although not distinctly stated, that the place in question was the dwelling-house occupied by the defendant and his wife, and that the defendant permitted the illegal conduct of the wife; and that proper instructions were given to the jury upon these points.

The court properly refused the single instruction requested.

Exceptions overruled.

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COMMONWEALTH *vs.* JOHN F. COSTELLO.

Suffolk. Nov. 27. — Dec. 6, 1875. COLT, J., absent.

On the trial of an indictment, charging the defendant in the first count with the forgery of a bond to dissolve an attachment, and in the second count with knowingly uttering the forged bond, the government proceeded upon the ground that the defendant fraudulently presented to a master in chancery a bond to dissolve an attachment purporting to be signed by S. and J. as sureties; that at the same time he produced before the master two accomplices, who falsely represented themselves to be S. and J., and testified to their sufficiency as sureties; and that the names of S. and J. were fictitious names signed or procured to be signed by the defendant. The government also offered evidence that no such persons as S. and J. could be found. The defendant offered to show, in explanation of the absence of S. and J. as witnesses in his behalf, that the prosecuting officer had openly threatened to prosecute them for perjury, and that they thereupon fled the Commonwealth and had not returned, and that he had made efforts to procure their attendance as witnesses. *Held*, that the exclusion of this evidence gave the defendant good ground of exception.

MORTON, J. We are of opinion that one of the exceptions alleged by the defendant must be sustained. As this makes a new trial necessary, we have not considered the other questions raised, because if they arise upon another trial they may be presented in a different aspect.

The indictment contains two counts: the first for forging a bond to dissolve an attachment, and the second for knowingly uttering the forged bond. The government proceeded upon the ground that the defendant fraudulently presented to a master in chancery a bond to dissolve an attachment, purporting to be signed by William P. Schell and Isaac Judson, as sureties; that he at the same time produced before the master two accomplices, who falsely represented themselves to be Schell and Judson, and testified as to their sufficiency as sureties; and that the names of Schell and Judson were fictitious names signed or procured to be signed by the defendant. The government also offered evidence tending to show that no such persons as Schell and Judson could be found.

The defendant, in explanation of the absence of Schell and Judson as witnesses in his behalf, offered to show that the prosecuting officer had openly threatened to prosecute them for perjury, and that they thereupon fled from the Commonwealth and

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had not returned, and that he had made efforts to procure their attendance as witnesses, but the court excluded the testimony. We are of opinion that this testimony should have been admitted.

The defendant's connection with the persons who represented themselves to be Schell and Judson was such that his failure to produce them as witnesses would give rise to very strong inferences against him in the minds of the jury. They had been his sureties; the fair inference was that he knew who they were and where they could be found, and an unexplained failure to produce them could not but be prejudicial to him. It was therefore important and competent for him to show that he had used efforts to procure their attendance as witnesses, and the reasons why he could not do so. The fact that he had not taken out a commission to take their depositions did not make the offered testimony incompetent. It might affect the weight of his explanation in the minds of the jury, but did not destroy its competency.

Exceptions sustained.

A. A. Ranney & J. L. Eldridge, for the defendant.

W. C. Loring, (*C. R. Train*, Attorney General, with him,) for the Commonwealth.

ROXIE M. BLODGETT & another *vs.* JAMES B. WEED & others.
ALBERT PALMER *vs.* SAME.
GEORGE HINMAN *vs.* SAME.

Worcester. Oct. 5. — Dec. 11, 1875. AMES, J., absent.

A partnership is liable to the holder of a promissory note made by one member of the firm, in its name, if the holder has no actual knowledge, suspicion or cause of suspicion of any fraud upon the partnership in the making of the note.

THREE ACTIONS OF CONTRACT. Writs dated October 28, 1873. The first action was by Roxie M. Blodgett and Susan A. Martin against James B. Weed, Frederick M. Weed, John Hill, D. B. Geary and D. W. Fuller, late copartners, doing business under the name of James B. Weed and Company, on the following promissory note, signed "James B. Weed & Co.": "$2600.

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Binghamton, N. Y., April 11, 1873. Six months after date we promise to pay to the order of Roxie M. Blodgett and Susan A. Martin twenty-six hundred dollars, value received, payable at any bank in Boston, Mass."

The second action was by Albert Palmer against the same defendants, on the following promissory note, signed "James B. Weed & Co.": "$3000. Binghamton, M. Y., April 5, 1873. On demand after date, we promise to pay to the order of John Hill & Co. three thousand dollars, value received, with interest at 10 per cent., payable at No. 3 Tremont St." This note was indorsed, "Pay to the demand of Albert Palmer, waiving demand and notice. John Hill & Co."

The third action was by George Hinman against the same defendants, on the following promissory note, signed "James B. Weed & Co.": "$5000. Boston, January 16, 1873. On demand, with interest, rate 12 per cent., after date, we promise to pay to the order of John Hill & Co. five thousand dollars, for value received, payable at No. 3 Tremont Row." This note was indorsed, "Pay to the order of George Hinman, waiving demand and notice. John Hill & Co."

The cases were tried together in the Superior Court, before *Brigham*, C. J., without a jury, and the following facts were found by him:

On September 1, 1871, the defendants, by a contract in writing, formed a partnership under the name and style of James B. Weed & Co., for the purpose of tanning, manufacturing and selling leather, for the term of five years from that date. In this contract Hill, Geary and Fuller, as they were copartners doing business at Boston under the name and style of John Hill & Co., constituted the party of the first part, and James B. Weed and Frederick M. Weed, of Binghamton, in the State of New York, constituted the parties of the second and third parts, and the contract was signed, not by John Hill & Co., but by the said Hill, Geary and Fuller, severally. The 6th article of agreement in said contract provided that "said parties or firm agree to contract no debts or liabilities, except by mutual consent, on account of said firm." Under the contract, James B. Weed and Frederick M. Weed, under the style of James B. Weed & Co., conducted the business of tanning, manufacturing, and more or less of sell

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ing leather, at Binghamton, and John Hill & Co., besides conducting their separate business of manufacturing and selling boots and shoes, at Boston, sold most of the leather tanned and manufactured by Weed at Binghamton, for account and in the interest of James B. Weed & Co., but in the name of John Hill & Co., to whom the leather was consigned, remitting the proceeds of the leather thus sold by them, in cash, to James B. Weed & Co., of Binghamton, or accepting and paying the drafts upon them of James B. Weed & Co., for such proceeds. On frequent occasions, for the purpose of renewing such drafts and acceptances, and to assist James B. Weed & Co. with financial facilities, and also on less frequent occasions for the accommodation of John Hill & Co. in their separate business, the Weeds sent to John Hill & Co. blank forms of promissory notes, signed by said Weeds, with the firm name of James B. Weed & Co., purporting to be made at said Binghamton, sometimes with, and sometimes without, the sum inserted in the blanks; and blanks thus sent to John Hill & Co. were filled, and the promissory notes thus made were negotiated by them, and they rendered an account of the proceeds thereof to James B. Weed & Co., at Binghamton.

In October, 1872, the parties to the contract of partnership had an accounting together, and entered into an agreement, which the judge did not treat as material to the issue on trial, except as indicating that there was an understanding between the parties, that John Hill & Co. should be furnished with no more of the signatures of James B. Weed & Co. to blank or other promissory notes, for negotiation by them in Boston; but immediately after the great fire in Boston, in November 1872, upon the urgent solicitation of John Hill & Co., said Weeds sent to them four at least of such blanks for making promissory notes, signed by said Weeds, with the name of James B. Weed & Co., at Binghamton.

There was no evidence that said James B. Weed or said Frederick M. Weed ever authorized or consented to the making of any promissory notes, or the signing of any promissory notes, by Hill, Geary and Fuller, or John Hill & Co., in or with the name of James B. Weed & Co., or the use of the name of James B. Weed & Co. in their business in Boston; or that said Weed had any knowledge of such a making or signing of any such promissory

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notes, until the summer of 1873, after the notes declared on, and others similarly signed, had all been signed and payment of some of them had been demanded of James B. Weed & Co at Binghamton.

The signature, "James B. Weed & Co.," upon the several notes declared on, were all made by the defendant John Hill, and the indorsements of the signatures, "John Hill & Co.," upon the said several notes, were all made by the defendant Daniel W. Fuller. The judge found that the firm of John Hill & Co. was in fact insolvent or in financial embarrassment, but not reputed to be so, when the promissory notes declared on were made; and that the same were made exclusively for the private and separate uses and business of John Hill & Co., or of Hill, Geary or Fuller, or in transactions conducted by them in the name of James B. Weed & Co., not relating to the sale of leather, tanned and manufactured by James B. Weed & Co., at Binghamton, or to the tanning or manufacture of the same, or to the business for which the partnership was established, and not authorized by the contract of partnership, or consented to or known by said Weeds, or the firm of James B. Weed & Co., as represented by said Weeds. James B. Weed & Co. had no advertised place of business in Boston, nor was there any sign upon John Hill & Co.'s place of business indicating that the business of James B. Weed & Co. in Boston was there transacted, but the fact that Hill, Geary and Fuller were members of the firm of James B. Weed & Co. was more or less known in Boston by means of their transactions.

The plaintiffs, Roxie M. Blodgett, and her sister, Susan A. Martin, paid the sum of $2600 in consideration of the note declared on by them, after a deduction of six months' interest on that sum at the rate of ten per cent. per annum, and this sum was thus paid by them, by the advice and procurement of Caleb Blodgett, husband of Roxie M. Blodgett, to whom the defendant, Fuller, applied for a loan of that sum, alleging that he acted on behalf of the firm of James B. Weed & Co., in which firm he had previously told Caleb Blodgett that he, Hill and Geary were partners with said Weeds, and said Blodgett knew of his having acted as a member of the firm previously. The judge found that the plaintiffs, Roxie M. Blodgett and Susan A. Martin, and their agent, said Caleb Blodgett, in the matter of lending said $2600

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and taking the promissory note declared on for that sum in consideration of said loan, acted in good faith, understanding that they were dealing with the firm of James B. Weed & Co., through a member of that firm, and that neither of them had any actual knowledge, suspicion or cause of suspicion of any fraud affecting James B. Weed & Co., on the part of Fuller, or of John Hill & Co., in procuring the loan or in making the note; or that the money thus loaned was not borrowed and received by James B. Weed & Co., and the note declared on in legal effect not made by them; or of any purpose of Fuller, or of John Hill & Co., to borrow said money and make said note for their private uses; or that neither Fuller or John Hill & Co. were authorized, as partners in the firm of James B. Weed & Co., to make the note.

The plaintiffs, Albert Palmer and George Hinman, lent, severally, the sums of $3000 and $5000, and received in consideration thereof the promissory notes declared on by them; and in the matter of making these loans and taking these notes, they had no personal negotiations with either of the defendants; but were induced to make the loans and take the notes by Halsey J. Boardman, an attorney at law, and partner of said Caleb Blodgett, who, upon the solicitation of the defendant Fuller, that Boardman would procure a loan to the firm of James B. Weed & Co., having previously told him that he, Hill and Geary were members of said firm, and he having known them to so act, negotiated with the plaintiffs, Palmer and Hinman, the loans aforesaid, and indorsed and delivered to them the notes declared on. The judge found that Palmer, Hinman and said Halsey J. Boardman, in the matter of the lending of said sums of $3000 and $5000, and taking of said promissory notes declared on, for those sums in consideration of said loans, acted in good faith, understanding that they were dealing with the firm of James B. Weed & Co., through a member of that firm, and that they had neither of them any actual knowledge, suspicion or cause of suspicion of any fraud affecting said James B. Weed & Co., on the part of defendant Fuller or of John Hill & Co., in procuring the loans, or in making the notes; or, that the money thus lent was not borrowed and received by James B. Weed & Co., and the notes declared on and held by Palmer and Hinman, not in legal effect, made by James B. Weed & Co.; or of any purpose of Fuller, or of John Hill &

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Co., to borrow the sums of $3000 and $5000, and make the said notes therefor, for their private uses, or that neither Fuller or John Hill & Co. were authorized as partners in the firm of James B. Weed & Co., to make said promissory notes.

Upon the foregoing facts, the judge ruled that the several plaintiffs were entitled to recover, and ordered judgment for them; and the defendants alleged exceptions.

H. B. Staples, for the defendants.

B. Dean, for the plaintiffs.

COLT, J. The several notes of the firm of Weed & Co., signed by one of its members, were given to the several plaintiffs for money lent. It is found as a fact that the plaintiffs understood that they were dealing with the firm through a member of it, and had no actual knowledge, suspicion or cause of suspicion of any fraud practised upon the partnership in the transaction by any member of it; or that the money was not borrowed by the firm and the notes in suit not given by its authority; or that there was any purpose on the part of any member or members of the firm to obtain the money for private use.

Upon the facts thus found by the judge, the plaintiffs are entitled to maintain their several actions. The cases fall within well settled principles governing the liability of copartners, and the findings of the judge were fully justified by all the evidence. *Warren* v. *French*, 6 Allen, 317. *Hayward* v. *French*, 12 Gray, 453.

There is nothing in the form of the notes, in the rate of interest reserved, or the time when payable, which alone can be held to affect the plaintiffs with constructive notice of fraud. And the findings of the court negative the existence of all notice, actual or constructive, all suspicion or cause of suspicion.

Exceptions overruled.

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GEORGE F. HEWETT *vs.* GEORGE SESSIONS.

Worcester. October 7. — December 11, 1875. AMES, J., absent.

In an action to recover for the conversion of a part of the furniture in a hotel, it appeared that the defendant was the owner of the hotel, and that the plaintiff had succeeded to the title to the furniture, which C., who carried on business in the hotel, had. One witness testified that he bought all the property in the hotel; that he used it, and told C. that he could take away a certain portion of the furniture, but nothing else. It appeared that no obstacle was put by the defendant in the way of the removal of all the furniture in suit. *Held*, that in the absence of evidence that the witness acted as the agent of the defendant, or bought the property of him, the defendant was not liable.

TORT for the conversion of furniture. Trial in the Superior Court, before *Dewey*, J., who after verdict reported the case to this court in substance as follows:

The defendant was the owner of a hotel, and one Camp carried on the same from May 12, to September 13, 1869, and the property alleged to have been converted was the furniture in the hotel. The plaintiff claimed title to the same under a mortgage given him by Camp, on September 13, 1869, and subsequently foreclosed, and it was admitted that whatever title Camp had on that day had vested in the plaintiff.

The case was referred to an auditor, who made his report, dividing the property into four classes, marked schedules C, D, F and G, and finding the value of the property in each schedule, which finding as to the value was agreed to be correct. At the trial the plaintiff did not claim to recover for the property enumerated in schedule C. As to the property in D, each party claimed that the title was in himself.

As to the property in schedule G, the defendant denied that he had ever converted it to his own use. The evidence as to the conversion of the property contained in this schedule was as follows: Camp testified that he left the hotel September 13, 1869 that soon after he left, two schedules of the property therein were made by the defendant and one Roberts that the schedules purported to contain all the property in the hotel; that they were marked C and D; that C contained that which the defendant did not claim, and D that which the defendant did claim as his own; that the property in G of the auditor's report was not contained

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in either of the original schedules; that in July, 1870, he sent a letter to Roberts, then in occupation of the hotel, notifying him that he should attend on July 5, 1870, to take away the property in the hotel belonging to him; that he did so attend with teams; that the defendant and Roberts went away after he got there that day, were gone about an hour, and when they came back said he might take away what was contained in C.

On cross-examination he said that no obstacle was put in his way to taking any of the property not contained in the original schedule D; that he picked out the property not claimed by the defendant, and carried away three or four loads; that he went for the purpose of taking away all the property that he left in the hotel that he put in; that he designated in his letter to Roberts all the property he put in; that Roberts gave him leave to take all the property he claimed. "Roberts said he was willing we should take out what Sessions did not claim. Our intention was to carry off the property Sessions did not claim as his. There were no obstacles to our taking away anything that was not in Sessions's schedule D."

James Roberts, called by the plaintiff, testified, that he bought all the furniture in the hotel and gave his notes for it all. That contained in C he bought conditionally, and used it all; that soon after September 15, 1869, he gave notice to Camp that he was at liberty to take all the property he claimed away from the hotel; that he assisted in making the original schedules; that he received from Camp the notice in July, 1870, referred to in Camp's testimony; that he told him when he came that he could take away all that was contained in C, and nothing else; that no obstacle was put in Camp's way to prevent his taking all not contained in D.

The defendant testified that when Camp came to take away the furniture he gave him liberty to take all his (Camp's) property; that he never exercised any control over any part of the property, except what was in D.

Waldo Sessions, son of the defendant, testified that his father told Camp in July, 1870, when he came to take away the property, to take all that belonged to him, but to be careful and not take anything else.

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The defendant requested the judge to rule that there was no evidence to authorize the jury to find the conversion of the property contained in G. The judge declined so to rule, and submitted the question to the jury, reserving the question as to the correctness thereof; and instructed the jury: "That, as to the articles in schedule G, the plaintiff cannot recover, even if he owned them, unless there is evidence that satisfies you that the defendant made claim to those articles, or hindered the plaintiff from removing them. The fact that Sessions leased the building to Roberts would not make Sessions liable for the conversion of the property therein."

The jury found for the plaintiff for the property included in schedules F and G. If there was not sufficient evidence of conversion of the property in G. to authorize the jury to find the same, then the sum of $199.25 was to be deducted from the verdict and judgment rendered for the balance; otherwise judgment on the verdict.

G. F. Verry & F. A. Gaskill, for the defendant.

F. P. Goulding, for the plaintiff.

COLT, J. The only question is as to the sufficiency of the evidence to prove a conversion of the property named in schedule G. The only evidence which shows interference with the property there described on the part of anybody except the plaintiff and the witness Camp, comes from the testimony of Roberts, who says that he bought all the property in the hotel; that he used it all, and told Camp that he could take away all which was contained in schedule C, but nothing else.

The difficulty is that there is no evidence that Roberts was acting as the agent of the defendant, or had authority to speak for him, or that he bought the property of him, or that he in any way exercised any act of ownership or control over it. On the contrary, it appears that no obstacle was put by the defendant in the way of the removal of all the property in question. There is no evidence by which it can fairly be inferred that the defendant sold and delivered the property to a third person and received pay for it.

According to the terms of the report the value of the property contained in the schedule in question is to be deducted from the verdict, and judgment rendered for the balance only.

Judgment accordingly.

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ELLIOTT E. CUNNINGHAM *vs.* W. A. WASHBURN & another.

Worcester. October 6. — December 28, 1875. AMES, J., absent.

A. agreed in writing, for a round sum, to move a house, do certain work upon it, and "to finish said house ready for occupancy." In an action by A. on this contract, it was admitted that if the contract required A. to build a water-closet, he had not completed the contract. *Held*, that the court could not say, as a matter of law, that the omission of a water-closet was a failure to perform the contract; and that it was a question of fact for the jury to determine whether the building of a water-closet was reasonably necessary and proper to make the house ready for occupancy.

In an action upon a contract under seal, by which a builder agreed with two owners of a house to move it, and "dig and stone a cellar to set it on," it is a question of fact for the jury whether the use of new stones in building the cellar wall, which were ordered by one owner, was assented to or ratified by the other.

CONTRACT against W. A. Washburn and Frederick E. Abbott, upon an instrument under seal, dated October 15, 1871, and signed by the plaintiff and the defendants, reciting that the defendants were the owners of certain land in the city of Worcester, with a cottage standing thereon, which the defendants desired to remove to another part of the land, and providing as follows:

"Now, therefore, said Cunningham, being a practical carpenter and building mover, in consideration of four hundred and fifty dollars being paid to him, promises and agrees to move said building back upon the rear part of the lot, turn it half around, and front it on Barclay Street, dig and stone a cellar to set it on, and to finish said house ready for occupancy, doing the work well even to all the rooms, painting the house one coat of good oil and lead paint on the outside, and two good coats of oil and lead on the inside, and putting blinds on the windows outside, furnishing and finding all the stock and materials."

The declaration also contained a count upon an account annexed for stone and sheathing boards furnished, these not being included in the contract.

Trial in the Superior Court, before *Dewey*, J., who allowed a bill of exceptions in substance as follows:

The defendant Washburn testified that he went to the house at the time one Pike, the plaintiff's agent, was building the cellar wall and using the new stones; that he asked Pike why he was using new stones instead of the old, and Pike said that Ab

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bott has ordered them to be put in, and he, Washburn, then said that if Abbott had ordered them he might pay for them.

The plaintiff testified that he asked Washburn to pay for the job six weeks after it was finished, and he told him he was not going to pay for those new stones anything extra; that as Abbott had ordered them he might pay for them.

The defendants asked the judge to rule that the plaintiff could not maintain his action on the written contract, it being admitted by the plaintiff that he had not completed the contract if it required him to build a water-closet. The plaintiff admitted that he refused to put a water-closet into the house, and left the house without putting one in; the defendants requested the judge to rule that the contract as a matter of law required that a water-closet or privy should be built. The defendants also asked the judge to rule that the claim for extra stone could not be maintained against the defendants jointly.

The judge declined to give either of the rulings requested, but instructed the jury as follows: "In relation to the defendants' claim that the plaintiff wilfully abandoned his contract before it was completed, and that the defendants were therefore not liable, such is the rule of law, where wilfully, without cause, a party neglects to complete and abandons his contract. If the plaintiff had wilfully abandoned the work, leaving the house not finished according to the contract, he could not recover. But if a party in good faith proceeds under a special contract, and doing what he reasonably supposes is required, and substantially completes it, and the other party accepts the benefit of the work, although the contractor may not have done all that was really his duty, or in the exact manner required, still he may maintain an action for his labor and materials, but he cannot necessarily recover the cost of his materials or the ordinary price of labor. The party for whom the work was done is entitled to have deducted from the contract price the difference between the value of the work as done, and its value if it had been done in accordance with the contract.

"In relation to the proper construction and interpretation of the contract, it is a question of law for the court to decide. The contract provides that the plaintiff should 'finish the house ready for occupancy,' and then proceeds to state the details as to a por-

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tion of the work; as far as the manner of doing the work and the kind of work is specified, it is to be done as thus specified; the only difficulty arises as to the work not specified, but which is required by the provision 'to finish said house ready for occupancy;' the court cannot, as a matter of law, give you the details the parties have omitted, but instructs you that the plaintiff would, under this provision of the contract, be bound to do all things that would be reasonably necessary and proper to make the house ready for occupation, taking into consideration, in determining what should be done, the character of the house he was to finish; and if the jury find that he omitted anything specified in the contract, or omitted any other thing that was reasonably required to have such house as is referred to and described in the contract ready for occupancy, then he has not performed his contract and cannot recover upon it."

The judge also instructed the jury, that "In order to entitle the plaintiff to recover for the stone furnished, you must be satisfied that Abbott had authority from Washburn to make a change from the agreement as to the stone, and that if Abbott was acting for both in relation to the building and carrying out the contract, with a general authority from Washburn to make such changes as he deemed best, and he made the change as to the stone, Washburn would be bound thereby, or if Washburn, having knowledge of Abbott's acts, subsequently ratified the same."

The jury found for the plaintiff; and the defendants alleged exceptions.

C. A. Merrill, for the defendants.

J. R. Thayer, for the plaintiff, was not called upon.

DEVENS, J. The legal interpretation of a contract is for the court, which is to determine, where the words are unequivocal in their meaning, what it imports, and what are the obligations imposed by it. As, however, words and phrases are often used, which are technical or ambiguous, and sometimes, also, those which, although not in themselves unintelligible, require knowledge of the subject, in connection with which they are used, to apply them intelligibly, it may become necessary to resort to extrinsic evidence to ascertain thereby the intent of the parties in using them, in order that the contract may be construed in the light of the information thus acquired. The facts thus to be

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mquired into are determined by the jury under the direction of the court, which instructs them as to the construction to be given to the contract according to the various aspects in which such facts may present themselves. *Eaton* v. *Smith*, 20 Pick. 150. *Burnham* v. *Allen*, 1 Gray, 496. *Smith* v. *Faulkner*, 12 Gray, 251.

Whether the phrase "to finish said house ready for occupancy" was one which would require the building of a water-closet, depended upon certain extrinsic facts. The defendants do not object to the instructions given, in themselves, but contend that the court should have received the evidence of carpenters, and then, upon such evidence, have decided the matter without submitting it to the jury. This, however, would have taken from the jury its right to find the facts, and have trespassed upon its province. It is for the court only to decide the law upon the facts as they have been, or as they may be, ascertained; and while what the contract requires to be done is a question of law, the submission of the case to the jury to find the facts, with proper instructions as to the various aspects in which they may present themselves, gives to the court the construction of the contract as completely as if the jury found the facts specially and the court afterwards interpreted the contract in view of them as found.

In *Worcester Medical Institution* v. *Harding*, 11 Cush. 285, relied upon by the defendants, it was held by the court, as a matter of legal construction of the peculiar contract in that case, that a full completion of the wall, there contracted for, was not necessary, but only such completion thereof as would be necessary for the purpose of putting on the roof of the building; and as the facts in regard to this were admitted, there was nothing for the jury. In the present case, what the contract required to be done could not be determined as matter of law, except by determining as matter of fact what was reasonably necessary and proper to be done, considering the character of the building to be erected.

The ruling upon the remaining question was also correct. Although the written contract required the plaintiff to furnish all the stone for the cellars, yet it was competent for the parties subsequently to agree for stone of an extra quality. Under the instruction given, the jury must have been satisfied that Abbott

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had authority from Washburn to make this change, or that Washburn, with a knowledge of Abbott's acts, subsequently ratified them, and in either case both would be liable.

Exceptions overruled.

MARY TRACY *vs.* CHARLES HOWE & others.

Bristol. October 27. — December 4, 1875. MORTON, J., absent.

A person charged under the bastardy act with being the father of a bastard child, executed a bond, payable to the plaintiff, conditioned that he should appear at the next term of the Superior Court, answer to the complaint, and abide the order of the court thereon. The defendant duly appeared and answered, and was defaulted at the trial. *Held*, that there was a breach of the bond.

CONTRACT against Charles Howe as principal, and Andrew Riley and Patrick B. Wallace as sureties, upon a bond, dated December 5, 1873, payable to the plaintiff, and conditioned that the defendant Howe should appear at the next December term of the Superior Court at New Bedford, and answer to a complaint made by the plaintiff on her examination on oath before the Municipal Court of Taunton, charging him with being the father of a bastard child of which she was pregnant, and that he should abide the order of the Superior Court thereon. The answer of the defendants admitted the execution of the bond, but denied each and every other allegation in the plaintiff's declaration.

At the trial in the Superior Court, before *Wilkinson*, J., without a jury, the plaintiff introduced the record on the clerk's docket of her complaint, under the bastardy process, against Charles Howe, the principal named in the bond, by which it appeared that her complaint was entered at December term 1873 of the Superior Court; that the respondent appeared by his attorney at that term; that the supplementary complaint was filed June 9, 1874; that an answer, containing a general denial was filed August 5, 1874; that trial by jury was demanded September 8, 1874; that the defendant was defaulted May 10, 1875, and the order of affiliation was passed May 13, 1875. The plaintiff then rested her case.

The defendants declined to offer any evidence, and requested the judge to rule, as matter of law, that the evidence of the plain-

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tiff was insufficient to warrant a finding that there had been a breach of the condition of the bond, or such a breach as to authorize a judgment for the plaintiff.

The judge refused so to rule, but found for the plaintiff, and ordered judgment for the penalty of the bond, and execution to issue for the sum due to September 30, 1875. The defendants alleged exceptions.

S. R. Townsend, for Howe and Wallace.

G. E. Williams, for Riley.

J. Brown, for the plaintiff, submitted the case without argument.

AMES, J. The difficulty with the defence relied upon is that it contradicts the record of the court. By the terms of the bond, the principal obligor was bound to appear and abide the order of the court. He does not fulfil this obligation by merely entering an appearance and filing an answer, denying the charge against him. He is bound to be in court when the case is in order for trial, and his default, as entered of record, is conclusive proof of the fact that, although solemnly called, he did not appear. In this state of the case, it was impossible that the court could do otherwise than rule that there had been such a breach of the condition of the bond as to authorize a judgment for the plaintiff. *McGrath* v. *Conway*, 116 Mass. 360. As this is the only question raised by the defendants, the result must be that their

Exceptions are overruled.

THOMAS LUCE *vs.* JACOB B. HADLEY.

Bristol. October 28. — December 18, 1875. MORTON, J., absent.

The mortgagee of a vessel, who is in possession, and to whom supplies for the use of the vessel have been furnished, under such circumstances that he is liable for them, is properly described as owner in the declaration in an action to recover for the supplies.

CONTRACT. The first count of the declaration was as follows: "And the plaintiff says the defendant was in June, 1868, and is the owner of bark Ocean Steed, of New Bedford, and the plain-

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tiff, at the request of the defendant, furnished casks for said bark, in shooks, for her outfit for a whaling voyage, (a schedule of which appears by the account hereto annexed,) and the defendant owes the plaintiff the sum of $731.15, according to said account."

The second count was as follows: "And the plaintiff says the defendant owes him $731.15, according to the account hereto annexed.

"Jacob B. Hadley, owner of Ocean Steed,

To Thomas Luce, Dr.

"(1.) June 30, 1868 — 8554 gallon casks in shooks for Ocean Steed, at 6½ cents	$556.01
"(2.) Interest to date of writ	175.14
	$731.15"

The answer contained a general denial, and alleged payment.

At the trial in the Superior Court, before *Pitman*, J., it appeared in evidence, and was not disputed, that the shooks mentioned in the declaration were furnished to the bark Ocean Steed, a British vessel, but sailing from New Bedford; that the defendant, with others, held the vessel under a mortgage from the legal owners, who were British subjects, and a power of attorney from them authorizing him and his co-mortgagees to sell and dispose of the vessel; that the defendant and his co-mortgagees fitted her for the whaling voyage in which these shooks were used and for which they were furnished; and that the defendant never had any other title to the vessel.

Upon these facts, the judge ruled and instructed the jury, against the defendant's objection, that for the purposes of the case the defendant was an owner, so far as to enable the plaintiff to maintain his action upon the first count of his declaration. The jury returned a verdict for the plaintiff for the amount claimed, and the defendant alleged exceptions.

H. M. Knowlton, for the defendant.

G. Marston, for the plaintiff.

By the Court. The only question, which arises on the bill of exceptions in this case, is whether the mortgagee of a vessel who is in possession, and to whom supplies for the use of the vessel have been furnished, under such circumstances that he is

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liable for them, is properly described in the declaration as owner of the vessel.

By the well settled law of this state, a mortgage of a chattel vests the title and property in the mortgagee, which, although not absolute, is only defeasible upon a condition subsequent; and, unless there is an agreement to the contrary, the right of possession follows the right of property. The mortgagee is therefore properly described as owner. *Pratt* v. *Harlow*, 16 Gray, 379. *Coles* v. *Clark*, 3 Cush. 399, 401. *Esson* v. *Tarbell*, 9 Cush. 407, 411. *Dean* v. *M'Ghie*, 4 Bing. 45, 49. *Dickinson* v. *Kitchen*, 8 El. & Bl. 789. *Brown* v. *Tanner*, L. R. 3 Ch. 597, 602. *Exceptions overruled.*

JAMES M. MOTLEY *vs.* CYRUS SARGENT.

Suffolk. November 19. — December 28, 1875. COLT, J., absent.

A grant of land bounded by a way conveys the soil to the centre line of the way, unless a different intention appears by the other parts of the deed, or by the character of the locality to which the description is to be applied.

Land was conveyed bounded northerly on a street, seven feet four inches; easterly on another street, thirty-five feet four inches; southerly on the land of C., seventeen feet five inches; and "westerly on a passage way," thirty-four feet ten inches, "or however otherwise bounded, with the buildings thereon standing, and the free use and privilege of said passage way in common with myself, my heirs and assigns forever, reserving to myself, my heirs and assigns forever, a mutual privilege in the well and pump standing at the northwesterly corner of the above described land." By the same deed the grantor conveyed his interest in a strip of land adjoining the north end of the land above described, which had been taken by the town to widen the street. By a plan afterwards prepared, the accuracy of which was not questioned, the northerly line varied from that given in the deed, the southerly line of the lot was only fifteen feet three inches, excluding the passage way, and the passage way at that point was four feet wide. *Held*, that the grantee took to the middle of the passage way.

TORT for breaking and entering the plaintiff's close, being a passage way about four feet wide, bounded northerly on Elm Street in Boston, and lying between other land of the plaintiff on the west and land of the defendant on the east.

At the trial in the Superior Court, before *Wilkinson*, J., the defendant admitted acts done by him on the land, not authorized by an easement in the passage way, and the only issue was whether

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the plaintiff was the owner in fee of the whole of the passage way, or whether the defendant was the owner in fee of one half thereof.

In 1812, Zebulon Clapp was the owner of the parcels of land now owned by the plaintiff and by the defendant, with the passage way in question lying between them. The plaintiff claimed title through the following conveyances:

In 1818, Clapp's executor conveyed to William W. Motley a parcel of land bounded northerly on Elm Street, twenty-two feet; easterly on a passage way, thirty-seven feet eight inches; southerly on land of the heirs of Isaac Cutter, twenty-one feet ten inches; and westerly on land late of Andrew Oliver, there measuring forty feet; with the free use of the well and pump on land conveyed by Zebulon Clapp to Amos Binney, on the east side of said passage way, paying one half of the expense of keeping the same in repair. It was admitted that said deed duly conveyed the estate described therein; and that by a subsequent conveyance the estate came to one Mary Motley.

In 1853 and 1855, the heirs of Zebulon Clapp quitclaimed their right, title and interest in and to said passage way to Mary Motley, whose heirs, in 1864, conveyed the passage and the lot on the west, by one description, to the plaintiff.

The defendant claimed title to the fee of one half of the passage way through the following conveyances:

In 1812, Zebulon Clapp conveyed to Amos Binney a parcel of land "bounded northerly on Elm Street, seven feet four inches; easterly on Brattle Street, there measuring thirty-five feet four inches; southerly on land of the heirs of Isaac Cutter, seventeen feet five inches; and westerly on a passage way, there measuring thirty-four feet ten inches; or however otherwise bounded, with the building thereon standing, and the free use of said passage way in common with myself, my heirs and assigns, reserving to myself, my heirs and assigns forever, a mutual privilege in the well and pump standing at the northwesterly corner of the above described land, which well shall never be built upon without the consent of me the said Clapp, or my heirs and assigns; hereby also granting unto said Binney all my right, title and interest in or to a small strip of land adjoining the north end of the land above described, taken by the town to widen Elm Street."

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In 1848, the heirs of Binney conveyed to Atkins A. Clark "that lot of land bounded northerly by Elm Street, seven feet seven inches; easterly by Brattle Square, thirty-four feet; southerly by a line through the centre of the brick partition wall, fifteen feet three inches; and westerly by a passage way, thirty-three feet ten inches, be all or any of said measurements more or less, together with the free use and privilege of said passage way. . . . . Said lot of land is shown on a plan made by Alexander Wadsworth, March 10, 1848, a copy whereof is hereon indorsed." This plan corresponded to the measurement in the deed.

In 1858, Clark conveyed to the defendant by the same description as in the deed of the heirs of Binney to him.

The judge ruled that the defendant was the owner of the fee of one half of the passage way, and ordered judgment for the defendant; and the plaintiff alleged exceptions.

C. R. Train & F. S. Hesseltine, for the plaintiff. The intent of the parties, that the grant of the lot on the east of the passage way should extend only to the side of the way, appears by the careful and minute description, in feet and inches, of the front line of the lot on Elm Street, between Brattle Square and the way. This measurement indicates that a great degree of accuracy was sought and used by the parties to the deed. The shortness of the line, seven feet four inches, which takes in no part of the passage way, precludes the idea that it was the intention to convey nine feet eight and three fourths inches to the centre of the way; and where the measurement, by feet and inches, indicates great care, and the line is as short as this, it is evident that so great a mistake could not have been made. The general rule, that when known monuments are referred to as boundaries they must govern, yields when it is evident that no mistake in the measurement can reasonably be supposed to have been made. *Davis* v. *Rainsford*, 17 Mass. 207. *Tyler* v. *Hammond*, 11 Pick. 193. *Brainard* v. *Boston & New York Central Railroad*, 12 Gray, 407. *Cole* v. *Hxynes*, 22 Vt. 588.

The intent to convey only to the side of the passage way also appears by the words following the description of the lot, "and the free use and privilege of said passage way in common with myself, my heirs and assigns forever." By necessary implica-

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tion, this grant of an easement over the way excludes any greater title to it, and makes clear the intention to reserve the fee.

It also appears in the words "reserving to myself, my heirs and assigns forever, a mutual privilege in the well and pump," &c. This makes clear the intention to grant the fee of land on the east of the way, reserving an easement in it as to the well there situated, and to retain the fee of the passage, and grant an easement over it. The grantor grants the fee of one, reserving an easement, and grants an easement over the other, reserving the fee. *Codman* v. *Evans*, 1 Allen, 443.

It still further appears in the words, "hereby also granting unto said Binney all my right, title and interest in and to a small strip of land adjoining the north end of the land above described, taken by the town to widen Elm Street." This clearly indicates that it was understood that "the land above described" was limited by the description to the side lines; and to grant the fee of a small strip within and on the edge of the highway "adjoining." It was necessary to particularly include it by the additional words.

It further appears in the words, "the well and pump standing at the northwesterly corner of the above described land." These words indicate the limit or northwesterly corner of the land described in the conveyance to be on the east of the passage way.

C. A. Welch & F. Woodside, for the defendant.

DEVENS, J. The only question necessary here to be determined is, what was the legal effect of the deed of Clapp to Amos Binney in 1812, so far as it concerns the conveyance of the easterly half of the passage way. If it failed to convey this, the plaintiff has shown title to it, and may maintain this action, the defendant having done acts therein not authorized by a mere right of passage, which it is conceded he has. If, on the other hand, the easterly half of the passage way was thus conveyed, it is unimportant whether it has been since conveyed by the heirs of Amos Binney, to whom the estate descended, and under whom the defendant claims, as the plaintiff claims no rights under them.

The estate conveyed to Binney was bounded "westerly on a passage way" for the distance of thirty-four feet and ten inches and it is a general rule of construction that where there is a

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boundary upon a fixed monument which has width, as a way, stream or wall, even if the measurements run only to the side of it, the title to the land conveyed passes to the line which would be indicated by the middle of the monument. *Newhall* v. *Ireson*, 8 Cush. 595. *Boston* v. *Richardson*, 13 Allen, 146, and authorities cited. This rule of construction is adopted, however, only because it is deemed that the true intent and meaning of the parties is thus carried out; and the deed is always to be construed by this intent as indicated by its various parts, or by the character of the locality to which its description is to be applied. Each case must therefore depend, to a greater or less extent, upon its own peculiar circumstances, and by these it must be decided whether the general rule is to be controlled. *Codman* v. *Evans*, 1 Allen, 443. *Boston* v. *Richardson*, *ubi supra*.

The plaintiff contends that the intent of the parties that the lot granted to Binney should extend only to the side and not to the centre of the passage way, fully appears; that the careful and minute description in feet and inches of a line so short as that upon Elm Street, which was the front line, precludes the idea that there could have been any mistake, or that it could have been intended to convey to the centre of the way. It is true that the general rule, that monuments govern rather than courses and distances, must yield, when an adherence would lead to a result plainly absurd, or when the intent to exclude them appears. *Davis* v. *Rainsford*, 17 Mass. 207. *Brainard* v. *Boston & New York Central Railroad*, 12 Gray, 407. *Wilson* v. *Hildreth*, 118 Mass. 578. But no such case is here presented. Even this front line, exclusive of the passage way, when a plan (the accuracy of which has not been questioned) is afterwards prepared, is shown to vary in length from that called for by the deed, while, if the length called for is given to the rear line, the description would at the rear include the half of the passage way which is claimed by the defendants to have been conveyed to Binney; the deed giving seventeen feet five inches as the length of that line, while the rear line of the lot as surveyed has only a length of fifteen feet three inches, if the passage way be excluded.

Nor can the monument be disregarded on account of the grant of "the free use and privilege of said passage way in common

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with myself, my heirs and assigns." Such a grant was necessary to enable him to use the whole way as a passage. There has been occasion to construe similar words, and it has been held that a similar grant would not show that the grantor had not already granted the fee in half the passage way if, by the usual construction of the deed, it was to be deemed to have been included. *Stark* v. *Coffin*, 105 Mass. 328, 330.

The reservation of a right to use the well and pump on the granted land was of course necessary, if the grantor desired to retain that privilege; but it cannot be deemed, as the plaintiff argues, that because he grants a fee in the land conveyed, retaining an easement therein, he therefore retains the fee in the passage, granting there only an easement. The well and pump are indeed spoken of as "standing at the northwesterly corner of the above described land;" but this would be a sufficiently accurate description of the locality of two such objects, if they stood within two feet of the corner, as they would do if the description included the half of the passage. From the nature of the objects, they could not be exactly at the angle which made the northwesterly corner.

Nor is it to be inferred, from the grant of all the right, title and interest which the grantor had in the small strip "taken by the town to widen Elm Street" from the north end of the "land above described," that therefore his grant was to be limited by the side lines as they would be measured. This strip was not in his possession except subject to the purpose for which it had been taken by the town, and he sees fit therefore to describe it separately. But such a description would not be inconsistent with his having conveyed, on the side of the lot described, to the centre of the passage way.

The plaintiff has sought to invoke the principle that where lines are laid down on a plan or map and referred to in a deed, the courses, distances and other particulars appearing on such plan are to be as much regarded as if they were expressly recited in the deed. *Codman* v. *Evans*, 1 Allen, 443. This has, however, no application. No such plan or map existed or was referred to, when the deed to Binney was made. Such a plan was indeed used and referred to when the Binney heirs, many years after conveyed to the defendant's grantor; but, as before suggested, it

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is immaterial here whether they have conveyed the half of the passage or not, if their ancestor received a conveyance of it.

Much reliance has been placed upon the case of *Codman* v. *Evans*, *ubi supra*. Without discussing that case in detail, it may properly be said that there is here no such exclusion of the passage way as there appeared, nor a description of any of the lines such as was found of the southerly line of the lot there described, which necessarily must have been rejected if the grant of the lot there had been held to extend to the centre of the passage way.

Upon the whole case, the plaintiff has failed to show any intent, as expressed by the deed to Binney, or indicated by the localities, such as should take the construction of it out of the general rule, that the middle of the monument must be the boundary line.

Exceptions overruled.

GEORGE E. WILLIAMS & wife *vs.* INHABITANTS OF LEYDEN.

Franklin. Sept. 22, 1875. — Jan. 4, 1876. AMES & DEVENS, JJ., absent.

In an action against a town to recover for injuries occasioned by a defective highway, there was evidence tending to show that, at the time of the accident, the plaintiff was driving in a carryall; that suddenly the horse stopped, jumped aside, cramped the nigh wheel and began to back; that the plaintiff jumped out and was injured, the horse going over an embankment; that the horse driven by him was one of a span of team horses, and had been accustomed to draw on the nigh side in double harness, and that he had never been driven in the same carryall, but had been driven in single harness. The defendant asked the judge to instruct the jury that if the horse was most usually driven in double harness and on the nigh side, and, from the habit of taking the nigh rut, turned to the left and cramped the wheel and began to back, and the plaintiff jumped out instantly upon the cramping of the wheel, the plaintiff cannot recover for any injury sustained from the jumping out. The judge declined to give this instruction except with the qualification, "unless the act was done under a reasonable apprehension that the carriage would go over the bank." *Held*, that the defendant had no ground of exception.

TORT to recover for personal injuries alleged to have been caused by a defect in a highway in the defendant town. Trial in the Superior Court, before *Allen*, J., who allowed a bill of exceptions in substance as follows:

The plaintiffs' evidence tended to show that they were driving in the evening, in a one horse carryall, on a highway which it

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was admitted the defendant town was bound to keep in repair; that they were going in a southerly direction, up a hill, on a smooth road about fourteen feet wide; that on the easterly side of the road there was a bank wall about three feet and a half high, without a railing; that suddenly the horse stopped, refused to draw, jumped aside, cramped the nigh wheel and began to back; that both the plaintiffs jumped from the carryall, and George E. took the horse by the head, and instantly the horse backed the carryall over the embankment, taking George E. along with him; and that both the plaintiffs sustained injury from what immediately followed the jumping out.

It was a question on which there was conflicting evidence as to the character and fitness of the horse for travelling on the highway at the time of the accident; also as to the care and skill of the driver; and the usual instructions, not objected to, were given on both points.

There was also evidence tending to show that the horse was one of a span of team horses, and had been accustomed to draw on the nigh side in double harness, and that he had never before been driven in the same carryall, though he had been driven in single harness; and in the closing argument the plaintiffs' counsel suggested, as a theory of the accident, that the action and conduct of the horse might be explained by his habit of working in double harness on the nigh side, which might have led him to travel out of the centre of the road in the nigh rut, and, in so starting to the left, cramped the wheel and in some way made the backward movement which caused the plaintiffs to jump from the carryall and the backing off the embankment.

In relation to this part of the case the defendant asked the judge to instruct the jury as follows: "If the horse was most usually driven in double harness and on the nigh side, and, from the habit of taking the nigh rut, turned to the left and cramped the wheel, and began to back, and the plaintiffs jumped out instantly upon the cramping of the wheel, the plaintiffs cannot recover for any injury sustained from the jumping out." The judge declined so to instruct the jury, except with this qualification, "unless the act was done under a reasonable apprehension that the carriage would go over the bank."

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To this ruling, instruction and refusal to instruct, the defendant alleged exceptions.

C. Delano & C. G. Delano, for the defendant.

C. C. Conant, for the plaintiffs.

MORTON, J. The only question presented by this bill of exceptions is whether the presiding judge properly refused to give the instruction requested by the defendant.

There was evidence tending to show that, at the time of the accident, the plaintiffs were driving in a carryall; that the horse driven by them "was one of a span of team horses, and had been accustomed to draw on the nigh side in double harness, and that he had never before been driven in the same carryall, though he had been driven in single harness;" and the defendant asked the court to instruct the jury that "if the horse was most usually driven in double harness and on the nigh side, and, from the habit of taking the nigh rut, turned to the left and cramped the wheel and began to back, and the plaintiffs jumped out instantly upon the cramping of the wheel, the plaintiffs cannot recover for any injury sustained from the jumping out." The court declined to give the instruction except with this qualification, "unless the act was done under a reasonable apprehension that the carriage would go over the bank." The instruction requested is capable of a double meaning. It may be construed as asking the court to direct a verdict for the defendant upon the ground that the injury to the plaintiffs was caused by their jumping out, and not by the defect of the road, in which aspect the qualification added by the court was a correct statement of the law. *Sears* v. *Dennis*, 105 Mass. 310. Or it may be construed as asking the court to direct a verdict upon the ground that the injury was caused by a vicious habit of the horse; and the town now contends that upon this ground it was entitled to the instruction without the qualification. But it was for the jury, and not for the court, to determine whether the horse had any vicious habit or trick which contributed to the injury. It appears by the bill of exceptions that the jury were properly instructed as to what the plaintiffs must prove as to the character and fitness of the horse for travelling on the highway at the time of the accident. Upon this question, the facts, so far as they were proved, that the horse was most usually driven in double harness, on the

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nigh side, and had the habit of taking the nigh rut, were properly submitted to them; but the court could not rule, as matter of law, that these facts showed a vicious habit of the horse which rendered him unfit to be driven in single harness. We are therefore of opinion that the instruction requested was properly refused. *Exceptions overruled.*

FRANKLIN SAVINGS INSTITUTION *vs.* CENTRAL MUTUAL FIRE INSURANCE COMPANY.

Franklin. Sept. 22, 1875. — Jan. 4, 1876. AMES & DEVENS, JJ., absent.

Where a building is insured against fire by a policy which provides that "if the assured shall vacate the property in whole or in part, this policy shall be void; this company will not insure unoccupied property," and an indorsement is made upon the policy by which it is to be payable in case of loss or damage to mortgagees of the insured property "as their mortgage claim may appear," and the property is afterwards destroyed by fire, when unoccupied, the policy is void both as to the original assured and the mortgagees.

MORTON, J. The policy of insurance, upon which this suit is brought, contains the provision that "if the assured shall vacate the property in whole or in part, this policy shall be void; this company will not insure unoccupied property." It appears by the agreed statement of facts that the premises were vacated by the occupant before the fire and remained unoccupied up to the time of the fire. It is clear, therefore, that the policy was void as to Kelliher, the original assured, and that he could not maintain an action upon it. *Harrison* v. *City Ins. Co.* 9 Allen, 231. *Keith* v. *Quincy Mutual Ins. Co.* 10 Allen, 228.

But the plaintiffs contend that by the indorsement upon the policy a new contract of insurance was made with them, and that they are not affected by the acts of Kelliher in vacating the property insured. The plaintiffs held a mortgage of the property, and on the day after the policy was issued, an indorsement was made upon it that it was to be payable in case of loss or damage to them "as their mortgage claim may appear."

It has been repeatedly held by this court that such an indorsement does not operate as an assignment of the policy, nor as a

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contract to insure the interest of the mortgagees, but that they can claim only what the party originally insured is entitled to recover under his contract. *Fogg* v. *Middlesex Mut. Ins. Co.* 10 Cush. 337. *Hale* v. *Mechanics' Mut. Ins. Co.* 6 Gray, 169. *Loring* v. *Manufacturers' Ins. Co.* 8 Gray, 28.

The case at bar falls within these decisions, and is clearly distinguishable from *Foster* v. *Equitable Ins. Co.* 2 Gray, 216, upon which the plaintiff relies. In that case the assured assigned his policy to the mortgagee, who, as required by the company, gave his deposit note, promising to pay all assessments thereafter made against said policy. The court held that the effect of this was to create a new contract of insurance, by which, for a new consideration, the company agreed to insure the interest of the mortgagee, and therefore that he would not be affected by the subsequent acts of the party originally insured. But in the case at bar there was no assignment of the policy, and the plaintiff did not give any deposit notes. The only new contract entered into was, that the defendant should pay to the plaintiffs any loss to which Kelliher might be entitled under his policy, not in full, but to the extent of their claim as mortgagees.

For these reasons, without considering the other objections made by the defendant, we are of opinion that the plaintiffs are not entitled to recover. *Judgment for the defendant.*

S. O. Lamb, for the plaintiffs.

W. S. B. Hopkins, for the defendant.

CHESHIRE NATIONAL BANK *vs.* DWIGHT JEWETT.

Franklin. Sept. 22, 1875. — Jan. 4, 1876. AMES & DEVENS, JJ., absent.

Tobacco stored in barns, hanging on poles in process of curing and in such condition that it cannot be moved without great damage to it, is subject to attachment.

Under the Gen. Sts. c. 123, § 57, providing that in the attachment of articles of personal estate, which "by reason of their bulk or other cause cannot be immediately removed," a certified copy of the writ and the return may be filed within three days in the office of the city or town clerk, it is sufficient if the property cannot be removed without great damage to it.

Tobacco in the process of curing, and in such condition that it could not be removed without great damage to it, was attached under the Gen. Sts. c. 123, § 57, and

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afterwards, at the time when it required to be stripped and packed, was stripped and packed by the defendant in boxes so that it could be transported without injury. No arrangement was made between the defendant and the attaching officer in regard to the stripping and packing, and the officer did not see the tobacco until after it was packed, when he locked up the boxes containing it in a building upon the defendant's premises. The defendant afterwards mortgaged it to a person who had no knowledge of the attachment. The key to the building was kept by the officer for several months, and then given to the defendant's assignee in bankruptcy to enable him to examine the property, and by him lent to the defendant for a special purpose, without the knowledge of the officer. The mortgagee afterwards took possession and placed a keeper in charge of the property, from whom and against whose protest it was taken by the officer. *Held*, that there was no such misconduct or neglect shown on the part of the plaintiff or the officer as would dissolve the attachment.

CONTRACT. Writ dated September 20, 1873. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, on an agreed statement of facts in substance as follows:

It appeared by the officer's return that on September 20, 1873, he attached all the tobacco then hanging in the barns on the premises occupied by the defendant, namely, the crop of 1873, and on September 22, 1873, deposited an attested copy of the writ, without the declaration, and of his return thereon, in the office of the clerk of the town of Deerfield.

On June 6, 1874, the defendant filed a petition in bankruptcy, and afterwards made a composition with his creditors, which was approved by the court, and recorded, and became binding to bar the plaintiff in this action, except so far as his rights may be modified by the attachment.

The tobacco, when attached, was hanging upon poles, in the process of curing. Tobacco in that condition cannot be taken down or removed without great damage. This was the only reason why the property could not have been immediately removed at the time of the attachment, and it was on this account that the officer adopted the mode of attachment set out in his return. Tobacco, after hanging a sufficient length of time upon poles in order to properly preserve it, needs to be taken down from the poles, stripped and packed in boxes, after which it goes through a process which is called a sweat, before it is fit to be unpacked or used. The work of taking down, stripping or packing should be done during the first winter after the tobacco is cut, by persons

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having some skill and experience in such business and in weather adapted by its temperature to the work. The attaching officer having taken no measures for the stripping and packing of the tobacco, and the time having arrived when it needed to be done, the defendant, with the assistance of other persons employed by him, on or about December 20, 1873, took it down, stripped and packed it in boxes, after which it could be easily transported from place to place without injury.

On April 15, 1874, the defendant made a mortgage thereof to Roswell P. Crafts, which was duly recorded, Crafts having no knowledge of said attachment. No arrangement or contract was made between the defendant and the attaching officer in regard to the stripping and packing, nor did the attaching officer see the tobacco or give any directions about it until about April 1, 1874, when he took the cases containing it and locked them up in a building upon the defendant's premises. The tobacco remained there for some months, when the key, which had been in the custody of the officer up to that time, was given into the possession of the defendant's assignee in bankruptcy to enable him to examine the property, and by him lent to the defendant for a special purpose, without the knowledge of the officer, and the defendant retained it, without objection and without the personal knowledge of the officer, in his possession for several weeks, during which he had access to the place where the tobacco was, and during this time Crafts came to the place and claimed to take possession of the property under his mortgage, no one hindering him, and put a different lock upon the door, and left a keeper in charge of it, the former lock having been taken off. Subsequently the officer came and took away the tobacco, against the protest of Crafts's keeper.

Upon the foregoing facts, such judgment was to be rendered as the court should direct.

A. De Wolf, for the plaintiff.

G. M. Stearns & M. P. Knowlton, for the defendant.

COLT, J. The defendant contends, upon the facts agreed, that there is no valid subsisting attachment of personal property, against which, since the bankruptcy of the original defendant, a special judgment can now be rendered; first, because, the property taken on the writ was, from its nature and situation, exempt

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from attachment, next, because the mode adopted by the officer in this case did not constitute a valid attachment; and, lastly, because the lien, if any, thereby created, has been since lost by the neglect or misconduct of the attaching officer.

The property attached was tobacco stored in barns, hanging on poles, in process of curing, and in such condition that it could not be moved without great damage.

In this Commonwealth all personal property liable to be taken on execution is subject to attachment, except such as, from its nature or situation, has been considered as exempt according to the principles of the common law here adopted and practised on. Gen. Sts. *c.* 123, § 32. In *Bond* v. *Ward*, 7 Mass. 123, it was accordingly held that hides in a vat for tanning could not be attached, because they could not be returned in the same plight. And the same rule was said to apply at common law to sheaves of corn or hay in a cock or barn, "because they would be injured, as the grain of the sheaves would be shattered." This rule was affirmed in *Campbell* v. *Johnson*, 11 Mass. 184, but was held not to apply to hay in a barn, because on account of the changed condition of husbandry, the reason of the rule "has ceased with us." It has long been held in this state that corn or other growing products of the soil, when ripe and in a fit state to be gathered, could lawfully be attached or taken on execution, and that the officer might enter, cut down, seize and sell the same as personal estate. *Penhallow* v. *Dwight*, 7 Mass. 34. *Heard* v. *Fairbanks*, 5 Met. 111. *Mulligan* v. *Newton*, 16 Gray, 211.

An exception to the old rule which forbids the attachment of property which cannot be returned in the same plight, is thus established by our decisions, which embraces all annual products of the soil when ripe and fit for harvest, and includes tobacco when in the condition here described. In the application of this exception, it would be impracticable to distinguish tobacco from other annual crops simply on the ground that the successful harvesting and curing of it require more time and care. And the objection that the duties required to secure the crop are such as do not properly belong to the attaching officer, applies equally to all crops which require harvesting.

As to the validity of the attachment on other grounds, the case comes within the provisions of the statute which authorize a

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return to the town clerk's office when an attachment is made of personal property which, by reason of its bulk or other cause, cannot be immediately removed. Gen. Sts. *c.* 123, § 57. It is true the only reason here given for not removing the tobacco at the time of the attachment is, that it could not be then removed without great damage. But that is one way of stating that the property was not in a condition for immediate removal within the fair meaning of the statute. In determining that question, the liability of the property to injury, as well as the expense and difficulty attending its removal, are to be considered. *Polley* v. *Lenox Iron Works*, 4 Allen, 329.

The officer acquired a special property in the tobacco attached by virtue of his attachment in this form, which was good, at least so long as the difficulty of its removal remained, as against all persons interfering, and which remained good until some title was acquired which could be set up as valid against the attachment. Before any such title was acquired, the sheriff took actual possession of the property and placed it under lock and key. There is nothing to show a voluntary surrender or abandonment of the attachment on the part of the officer or the plaintiff in this suit at any stage of the case. And we do not find any such neglect on the part of the officer, after actual custody was taken by him, as should defeat the creditor's lien upon this property. *Butterfield* v. *Clemence*, 10 Cush. 269. *Shephard* v. *Butterfield*, 4 Cush. 425.

Special judgment for the plaintiff.

ENOS PARSONS *vs.* WILLIAM E. TOPLIFF.

Hampshire. Sept. 22, 1875. — Jan. 4, 1876. AMES & DEVENS, JJ., absent.

In an action by an assignee in bankruptcy to recover the value of personal property upon the ground that it was transferred to the defendant in fraud of the bankrupt act, it appeared that, more than four months before the filing of the petition in bankruptcy, two of the creditors of the bankrupt brought suits against him and attached the property in question, which was placed by the officer in the charge of the defendant, who receipted therefor in the usual form. The bankrupt afterwards executed a bill of sale of the attached property to the defendant, who sold a part of it and applied the proceeds to the satisfaction of the executions in the suits of the

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attaching creditors. The jury were instructed that if the arrangement between the defendant and the bankrupt was to the effect that the property should be sold and the proceeds applied towards the payment of the debts of the attaching creditors, without regard to attachments, and without a demand perfected in execution, that would be a preference, and in that case the defendant could claim no protection under the attachments; but if the understanding and intent was that the proceeds of the property should be held by the defendant as security against his liability on his receipts and applied on the debts only upon demand duly made on execution, and the sales were in good faith and the proceeds in fact applied on the executions, the defendant could claim protection under the attachments, unless it appeared that the parties intended a preference, or a fraud to prevent the property from distribution under the bankrupt act. *Held*, that the instruction was sufficiently favorable to the plaintiff, and that he had no ground of exception.

In an action by an assignee in bankruptcy to recover the value of personal property upon the ground of a fraudulent preference, the plaintiff requested the court to instruct the jury "that the transfer in any case by a debtor of a large portion of his property, while he is insolvent, to one creditor, without making provision for an equal distribution of its proceeds to all his creditors, necessarily operates as a preference to him, and must be taken as conclusive evidence that a preference was intended, unless the debtor can show that he was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts. The burden of proof is upon him, in such a case, and not on the assignee." This instruction was not given, and the jury were instructed that the burden of proof throughout was on the plaintiff, but that the intent of the parties might be inferred from their acts, and that, if the conveyance to the defendant was out of the usual and ordinary course of business, the statute made it *primâ facie* evidence of the fraudulent intent of the parties. *Held*, that the instruction given was correct; and that the plaintiff had no ground of exception.

MORTON, J. This is an action, brought by the assignee in bankruptcy of George and Philo Pomeroy, to recover the value of certain personal property, upon the ground that it was transferred by the bankrupts to the defendant in fraud of the provisions of the bankrupt law.

It appeared that more than four months before the filing of the petition in bankruptcy, two of the creditors of the bankrupts brought suits against them and attached the property in question. On the same day on which the attachments were severally made, the defendant receipted for the property attached, in the usual form, agreeing to keep the property safely and to redeliver it to the officer, so that it might be taken on execution. The effect of these receipts was to make the defendant the agent of the officer to hold the property. The attachments still continued, and as they were not dissolved by the bankruptcy proceedings the assignee could not hold the receiptor liable to him for the property

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or its value, but the latter was liable to the officer. *Ives* v. *Sturgis*, 12 Met. 462.

But it also appeared that after the defendant had given the receipts the bankrupts executed to him a bill of sale of the attached property, and that he sold a part of it and applied the proceeds to the satisfaction of the executions taken out in the suits of the attaching creditors.

The plaintiff contended that this bill of sale was in fraud of the bankrupt law, and the defendant claimed that it was given to him merely for the purpose of securing him as receiptor. Upon this part of the case, the court, against the objection of the plaintiff, instructed the jury "that if the arrangement between the defendant and the Pomeroys was to the effect that the property should be sold and the proceeds applied toward the payment of the debts of the attaching creditors, without regard to attachments, and without a demand perfected in execution, that would be a preference, and in that case the defendant could claim no protection under the attachments; but if the understanding and intent was that the proceeds of the property should be held by the defendant as security against his liability on his receipts, and applied on the debts only upon demand duly made on execution, and the sales were in good faith and the proceeds in fact applied on the executions, the defendant could claim protection under the attachments, unless it appeared that the parties intended a preference, or a fraud to prevent the property from distribution under the bankrupt act."

We are of opinion that this instruction was sufficiently favorable to the plaintiff. In order to avoid the transfer to the defendant as a fraud upon the bankrupt law, it was incumbent upon the plaintiff to prove that the defendant, when he took the transfer, knew that the transfer was made by the Pomeroys with a view to prevent the property from coming to their assignee in bankruptcy, or to evade some of the provisions of the bankrupt aw. U. S. St. 1867, *c.* 176, § 35. U. S. Rev. Sts. § 5129.

Under the instructions given them, the jury must have found that the transfer was not made with the intent to evade any of the provisions of the bankrupt law, but merely as security for the liability of the defendant on his receipts.

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The bankrupt law does not render such a transfer, made in good faith, voidable by the assignee. It is not tainted with any fraudulent intent to evade the provisions of the law, and its effect cannot be, either to give a preference to creditors, or to prevent any property from going to the assignee to which he is entitled. As there were valid attachments not dissolved by the bankruptcy, the assignee, after his appointment, had no interest in the property unless there was more than enough to satisfy the liens created by the attachments. If there had been a surplus in the defendant's hands, after satisfying such liens, the assignee might have been entitled to it, but under the instructions the jury must have found that the property and its proceeds were applied on the executions, so that there was no surplus.

One other exception remains to be considered. Upon the question whether the parties to the bill of sale knew or had reasonable cause to believe that the Pomeroys were insolvent and intended to give a preference, or to prevent the property or its proceeds from coming to the assignee, the plaintiff requested the court to give the following instruction to the jury: "The transfer in any case by a debtor of a large portion of his property, while he is insolvent, to one creditor, without making provision for an equal distribution of its proceeds to all his creditors, necessarily operates as a preference to him and must be taken as conclusive evidence that a preference was intended, unless the debtor can show that he was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts. The burden of proof is upon him in such a case, and not on the assignee." The court refused to give this instruction, and instructed the jury "that the burden of proof throughout was on the plaintiff, but that the intent of the parties might be inferred from their acts, and that if the conveyance to the defendant was out of the usual and ordinary course of business, the statute made it *primâ facie* evidence of the fraudulent intent of the parties." This instruction was correct.

The plaintiff had the affirmative upon each of these propositions, and the burden rested upon him to prove them. *Forbes* v. *Howe*, 102 Mass. 427.

If the plaintiff proved that the transfer to the defendant was not made in the usual and ordinary course of business of the

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bankrupts, this fact would be *primâ facie* evidence of fraud; but the burden of proof would not be changed. *Blanchard* v. *Young*, 11 Cush. 341. *Central Bridge Corporation* v. *Butler*, 2 Gray. 130. *Wilder* v. *Cowles*, 100 Mass. 487.

The instruction requested by the plaintiff was inconsistent with these principles, and was therefore properly refused. The plaintiff relies upon the case of *Toof* v. *Martin*, 13 Wall. 40; but the adjudication in that case is not in conflict with the rule we have stated. Some of the language of the opinion countenances a different rule; but in the later case of *Wager* v. *Hall*, 16 Wall. 584, the court have interpreted the decision to be in conformity to the well established principles adopted in the instructions in the case at bar. *Exceptions overruled.*

C. Delano, for the plaintiff.

W. G. Bassett, for the defendant.

TIMOTHY M. WALKER & others *vs.* JOSEPHINE L. HILL.

Hampden. Sept. 29, 1875. — Jan. 3, 1876. AMES & DEVENS, JJ., absent.

A. entered into a written contract with B., by which B. agreed to build a house and barn for A., and do all the carpenter's work, and furnish all the material for a gross sum. B. afterwards ordered of C. in his own name, the windows and doors necessary for the house and barn, and, after some of them were delivered and placed in the buildings, A. called at C.'s shop to get the rest of the windows, and was told by C. that he had doubts of B.'s solvency, and had concluded not to trust him for the goods, and for that reason had withheld the remaining windows, and A. thereupon directed the plaintiff to send the goods to B. and charge them to A., and promised to pay for them. C. afterwards gave no credit to B., but wholly to A., but did not inform B. of the conversation, and afterwards delivered the goods to B. as he called for them. *Held*, in an action by C. against A. that the jury were warranted in finding that the promise sued on was a promise to pay the defendant's own debt, and not a promise to answer for the debt of another within the statute of frauds.

CONTRACT for goods sold. At the trial in the Superior Court, before *Colburn*, J., the jury found for the plaintiffs, and the defendant alleged exceptions, the substance of which appears in the opinion.

N. A. Leonard, for the defendant.

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M. P. Knowlton & C. L. Long, for the plaintiffs.

GRAY, C. J. The plaintiffs' right to recover is not disputed because the defendant is a married woman, or upon any other ground but that the contract sued on is a promise to answer for the debt of another, within the statute of frauds.

The evidence at the trial tended to show the following state of facts: In February, 1873, the defendant and one Warren entered into a written contract, by which Warren agreed to build a house and barn for the defendant, and to do all the carpenter's work and furnish all the material, for a gross sum. During the following summer, Warren ordered of the plaintiffs, in his own name, the windows and doors necessary for this house and barn. After most of these had been finished and delivered to Warren and placed in the buildings, the defendant's husband, acting in her behalf, called at the plaintiffs' shop to get the rest of the windows, and was informed by them that they had doubts of Warren's solvency, and had concluded not to trust him for the goods which he needed for the defendant's house, and for that reason had withheld the remaining windows; and the husband thereupon directed the plaintiff to send the goods to Warren and charge them to the defendant, and promised to pay for them. The plaintiffs, after this conversation, gave no credit to Warren, but wholly to the defendant, but did not inform Warren of the conversation, and afterwards delivered the goods to Warren as he called for them. The plaintiffs seek to recover the value of the goods so delivered after this promise of the defendant.

These facts warranted the jury in finding that the promise sued on was an express promise to pay the defendant's own debt, and not a promise to answer for any debt of Warren; and the case was submitted to them with appropriate and sufficient instructions.

Upon the facts which the evidence tended to prove, and which must have been found by the jury under the instructions of the court, the goods in question were sold directly to the defendant, and exclusively upon her credit. Even if the plaintiffs had previously agreed to deliver the goods to Warren, Warren had acquired no title in the specific goods, nor any interest in them which would prevent the plaintiffs from making a valid sale of them to another person. The plaintiffs could not indeed rescind their

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contract with Warren without his consent. But if they utterly abandoned the contract with him and sold the goods to another, and thereby committed a breach of that contract, such breach, whether known or unknown to Warren at the time, would render them liable in damages to him and prevent their maintaining any action against him upon the contract. The fact that by their agreement with the defendant the goods were to be delivered exactly as if Warren was still their debtor for the price, and that even some charges on their books were in the name of Warren, no more conclusively showed that the defendant's promise was within the statute, than in the ordinary case in which goods purchased by one person are by him ordered to be delivered to another, in which case it is well settled that the seller may recover against the person ordering the goods, upon proof that they were sold and delivered upon his exclusive credit and that any charge upon the seller's books to the other person was made by mistake. Whether the defendant is still liable to Warren under his building contract does not appear, and has no bearing upon this case, by the judgment in which Warren's right as against either party can be in no way affected, except so far as the plaintiffs' recovery in this action may afford Warren an additional protection. The risk, which either party took by his own act, of further liability to Warren, affords no reason why the defendant should not be held liable to the plaintiffs on the direct promise which she made upon sufficient consideration and with knowledge of all the circumstances. *Allen* v. *Leonard*, 16 Gray, 202. *Swift* v. *Pierce*, 13 Allen, 136. *Sinclair* v. *Richardson*, 12 Vt. 33 *Warnick* v. *Grosholz*, 3 Grant, 234. *Kutzmeyer* v. *Ennis*, 3 Dutcher, 371. *Puckett* v. *Bates*, 4 Ala. 390, 392. *Exceptions overruled.*

JOEL KENDALL *vs.* AMELIA E. JENNISON & another.

Hampden. Sept. 27, 1875. — Jan. 4, 1876. AMES & DEVENS, JJ., absent.

Where a wife, whose husband has left the Commonwealth and remained absent therefrom, is sued as a *feme sole*, upon a debt afterwards contracted by her, the burden of proof is on the plaintiff to establish her liability.

A husband left the Commonwealth remained absent therefrom, and six years after obtained a decree of divorce from his wife, for desertion, from a court of competent

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jurisdiction in the state where he then resided, and after due notice to her. The wife was afterwards sued, as a *feme sole*, for debts contracted after the husband's departure, and for others contracted after the divorce, and the case was submitted to the court upon an agreed statement of facts, with a provision that the court might draw such inferences from the facts as a jury might draw. There was some evidence tending to show an intentional abandonment of the wife by the husband at the time of his departure, but the wife did not appear in the divorce suit against her, and it did not appear that she made any objection to it. *Held*, that this court could not say, as matter of law, that the court below was not justified in finding as a fact that, up to the time of the divorce, there had been no such abandonment by the husband as would entitle the wife to be treated as a *feme sole*, and that she was liable for all debts contracted after the divorce.

CONTRACT against the members of the firm of Kendall & Jennison. The first count was on a promissory note signed by the defendants, dated September 11, 1869, and payable on demand. The other counts were on notes and accounts of a later date. Writ dated July 24, 1873. The defendant Jennison set up in her answer that, during the whole period of time wherein the alleged indebtedness was contracted, she was a married woman, the wife of one Edwin S. Jennison, and could not be held as a copartner. The other defendant was defaulted.

The case was submitted to the Superior Court on an agreed statement of facts, providing that the court might draw such inferences as a jury might draw, and being in substance as follows:

Amelia E. Jennison was married to Edwin S. Jennison at Keene, New Hampshire, about January 9, 1855. They lived together as husband and wife at Springfield, in this Commonwealth, for several years, until November, 1866, when said Edwin S. Jennison left Springfield and went to Charleston, South Carolina, where he has since remained in business, and most of the time as an officer in the custom house. He left Springfield on account of no dissatisfaction with his wife, but because he knew that she discovered evidence of his infidelity; he had private diseases, and she refused to cohabit with him longer. Since leaving Springfield, he has contributed nothing to her support, and has never furnished funds for her to come to Charleston or elsewhere, and has made no request for her to do so.

The defendant, with her son, went by land to Charleston, and being detained outside the limits of the city by reason of fever or other disease, demanding quarantine, she communicated with

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her said husband, and he answered, refusing to come to them, whereupon she returned to Springfield, after an absence of a few days. This visit was in August, 1871, and otherwise the defendant has not been in the State of South Carolina.

Edwin S. Jennison, on February 22, 1872, filed a libel in a court in South Carolina, and on April 9, 1872, obtained a decree of divorce from the defendant, for the cause of desertion. The decree was made by a competent court of said state, and Amelia E. had notice of the application.

If the court was of opinion that the coverture was no bar to the action, judgment was to be entered for the sum of $6674.98, with interest from the date of the writ. If the court was of the opinion that, by reason of the coverture, the plaintiff could recover only for the indebtedness contracted subsequently to the date of the divorce, then judgment was to be entered for the sum of $1247.63, with interest from the date of the writ; otherwise, for the defendant.

Brigham, C. J., ruled that the plaintiff was entitled to recover against said Amelia E. Jennison for that indebtedness only which was contracted after said divorce, and thereupon ordered judgment for the plaintiff against her in the sum of $1247.63, and interest; and the plaintiff alleged exceptions.

A. L. Soule, for the plaintiff.

J. E. McIntire, for the defendant.

COLT, J. This case was submitted to the court upon an agreed statement of facts, with a provision that the court might draw such inferences from the facts as a jury might draw. The question of fact to be decided was whether the husband of the defendant, when he left this Commonwealth, intentionally and actually renounced his marital rights and duties, and so far deserted and abandoned his wife that she was thereafter entitled to make contracts as a *feme sole*. The general rule being that a married woman cannot make a contract or be sued, in cases where the provisions of the statute having reference to her own property do not apply, it follows that the burden of proof is on him who seeks to charge her by reason of the exception here relied on.

In the case at bar, there is some evidence tending to show an intentional abandonment of the wife by the husband at the time of his departure from the state in 1866. On the other hand, the

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case finds that in 1872 the husband obtained a decree of divorce from his wife for desertion, from a court of competent jurisdiction in the state where he then resided, and after due notice to his wife. It does not appear that she appeared in said proceeding, or made any objection to it. We cannot say, as matter of law, that the court below was not justified in finding as a fact that, up to the time this divorce was obtained, there had been no such abandonment by the husband as would entitle the wife to be treated as a *feme sole*, and that after the divorce she was liable for all debts contracted. *Gregory* v. *Pierce*, 4 Met. 478.

Exceptions overruled.

JOSEPH SHAW *vs.* LEVI HITCHCOCK.

Hampden. Sept. 28, 1875. — Jan. 4, 1876. AMES & DEVENS, JJ., absent.

A. and B., the owners of adjoining lands, entered into an indenture under seal, whereby either was to have the right to build a party wall one half on the land of each. The indenture also provided that "the adjoining party may at any time use as much of the wall as he may choose for the erection of any building, but before he or they may use any or all of said wall, he shall pay the other party an appraised value of so much of said wall as he shall thus use." At the time the contract was entered into, B. had a building, one story high, on his land, with three sides of brick and the fourth side of wood, resting, by permission, on A.'s land. B. took down the wooden side of his building, and A. built the wall four stories high, leaving spaces for the timbers of B.'s building, and B. adjusted the timbers into these spaces, and so fitted his building and used the party wall, but did not otherwise use it. *Held*, in an action by A. against B. to recover for the value of the wall so used, that B. had not used the wall in the erection of any building, and that the action could not be maintained.

CONTRACT to recover one half the value of a party wall, which it was alleged the defendant had used, and which had been built by the plaintiff under an indenture under seal executed by him and by the defendant on January 17, 1873, the material parts of which are as follows:

"This indenture witnesseth, that the said Shaw and the said Hitchcock, in consideration of one dollar, and in consideration of the benefits to be derived from the mutual agreements and covenants of each hereinafter contained, do hereby covenant and agree each with the other, that either party or their legal repre-

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sentatives may build a partition wall on the line between their respective properties on Main Street, in said Springfield, as follows, to wit: Said wall shall be built one half on each side of said line, the whole to be a solid wall with the exception of flues." [Then followed a description of the manner in which the wall should be built.] "Said wall shall extend in height above the main floor in front on Main Street at least forty-five feet, and for a distance back from Main Street at least forty feet, at least the same height, and to be thoroughly capped with stone or metal, and the adjoining party or his legal representatives may at any time use as much of the within described wall, as he or they may choose for the erection of any building, but before he or they may use any or all of said wall, he or they shall first pay the other party or his legal representatives an appraised value of so much of said wall as he or they shall then use." [Then followed a provision in regard to appointing appraisers.]

At the trial in the Superior Court, before *Rockwell*, J., the plaintiff read the contract to the jury, and stated that he should prove that the plaintiff built the wall described in the contract, substantially as therein required, one half upon the land of the plaintiff, and one half upon the land of the defendant, four stories high above Main Street; that the plaintiff and the defendant were adjoining owners of lands upon Main Street, the plaintiff owning the piece of land formerly owned by the North Church; that the defendant had upon his lot a store at the time the contract was made, which was constructed of brick on three sides, with suitable stone foundations, but upon the side adjoining the plaintiff it was framed of wood, and rested upon the land of the plaintiff, the defendant having leased the right of the church, before the purchase of the land by the plaintiff, to construct said side upon the land of the church; that being thus situated it was impossible for the plaintiff to build said partition wall and locate it as provided in the contract, without destroying so much of the defendant's building as rested upon the land of the plaintiff and upon the width of one half the location of the partition wall upon land of the defendant; that said side and so much of the building as was necessary to locate the partition wall according to the contract was taken down by the defendant, and the rest of his building was propped and sustained by him during the erection of the

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partition wall; that as the wall was erected, spaces were left for the defendant to adjust his building into the partition wall, and the defendant did so adjust his building and entered said wall with his timbers, and so fitted his building as to make and use the partition wall the south side of his building; that the defendant was present during the building of said wall, and made suggestions as to how the same should be built, which were complied with; that the plaintiff asked the defendant to pay him for one half the partition wall as named in said contract, used by the defendant as aforesaid, and the defendant refused to pay the same, or to submit to or have any appraisal; that the building of the defendant was one story high above Main Street at the time the contract was entered into, and the defendant has not made any additions to or alterations in said building except as hereinbefore related.

Upon this statement of the plaintiff's case the defendant asked the judge to rule that the plaintiff could not maintain his action, and the judge so ruled; but by consent of both parties reported the case, before verdict, for the determination of this court. If the ruling of the judge was correct, judgment was to be entered for the defendant; otherwise the case to stand for trial.

G. M. Stearns, for the plaintiff. The question is what is meant in the contract by the provision concerning the "use" "of the within described wall" "for the erection of any building." Either party had the right to build the wall one half upon the land of each. Whenever that was done it became, when used, one of the sides of any structure then on the premises or thereafter put on. It constituted, when used, as much a part of the erection of any building upon the premises as it would if a building of three sides had been moved by either party upon the land and affixed to the wall as its fourth side. It was so understood by the defendant, and he made but a temporary side to his store where the wall would be laid. He, before the wall was built, took down the south side of his building, leaving it incomplete as a building and made it into a complete building by using the partition wall as part of the erection. It is the clear intent of the contract that either party may build the wall and the other party shall pay for as much as he uses for the purposes of a building. If the defendant's construction is correct, he can put three more stories

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upon the top of his one story, assert that he is not erecting a building, but only enlarging it or raising the roof, and pay nothing, or at least pay nothing for the part included in this controversy, which is the support and chief expense of the whole.

H. Morris, for the defendant.

COLT, J. The contract which is relied on to support the plaintiff's claim to recover one half the value of the partition wall, must be interpreted by the actual condition of the property of the parties at the time the agreement was made. They owned adjoining lots. The plaintiff's lot was vacant. The defendant's lot was occupied by a building one story high, which was of brick on all sides except the one next the plaintiff's lot. On that side it was of wood, and rested, by permission, on the plaintiff's land. The plaintiff's purpose was to erect a building on his own land which should be four stories high. In doing this, it would be necessary to remove the wooden side of the defendant's building, so as to make room for the partition wall located one half on each lot. The parties thereupon agreed that either might build the wall, and that the other might at any time use as much of it as he might choose "for the erection of any building," paying to the party erecting the wall the appraised value of so much of it as he shall then use. This is followed by a clause restricting the location of any building to be erected on either lot.

The plain interpretation of the contract is that the defendant incurs no liability to pay for the value of the wall until he makes some use of it in the future erection of some building, or of some addition to the old one. He has erected no building since the contract was made. *Judgment for the defendant.*

HENRY M. GUILD *vs.* B. B. BELCHER & others.

Hampden. Sept. 28, 1875. — Jan. 4, 1876. AMES & DEVENS, JJ., absent.

If a promissory note, signed by one member of a partnership in the firm name, is given in payment of debts, some of which were contracted before another member came into the firm and the rest thereafter, and an action thereon by the payee of the note is defended by such other member alone, the plaintiff, in the absence

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of evidence of actual fraud on his part, or of knowledge when the party defending entered the partnership, is entitled to recover for such debts covered by the note as were contracted after he became a member.

COLT, J. The action is against a partnership upon a promissory note payable to the plaintiff, and signed by Henry Comstock, one of the members, in the partnership name. The answer is a general denial; and the plaintiff was required, as part of his case, to prove the consideration of his note, *Davis* v. *Travis*, 98 Mass. 222. Belcher, the only one who defends, relied on the fact that the note declared on was given by another partner in part for a debt contracted before he became a member of the firm.

The judge was asked by the plaintiff to rule, that if a specific part of the consideration was a debt contracted while Belcher was a member, for which Comstock was authorized to give a note, then the plaintiff could recover that part. The judge declined to give this instruction, and instructed the jury that if the defendant was a partner, yet if the note was given without the knowledge or authority of the defendant, partly for a debt of the partnership, and partly for the debt of the other partners before he went into the partnership, the plaintiff could not recover on the note. The plaintiff was entitled to the ruling requested by him.

There is nothing in the case to charge the plaintiff with actual fraud, or to show that he knew the time when Belcher became a member of the firm, and no evidence that Belcher was not a secret partner. The defence, upon the evidence, amounted to partial want of consideration. The ruling asked for assumes that the note was rightly made and delivered, so far as it was founded on a valid consideration; and the case is presented of a promise founded on two distinct considerations, only one of which is good, where there is no difficulty in making the apportionment. In such case the plaintiff is entitled to recover to the extent of the valid consideration. This was held in *Parish* v. *Stone*, 14 Pick. 198, where it was also held that the holder in such case recovers on the note and not on the original consideration, because otherwise the right to recover *pro tanto* would not pass to the indorsee by the transfer of the note. And an indorsee without notice recovers the full amount of the note against all who are members at the time it was given. *Loring* v. *Sumner*, 23 Pick. 98. *Hodg*

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kins v. *Moulton*, 100 Mass. 309. *Wintle* v. *Crowther*, 1 Cromp. & J. 316. *Wilson* v. *Lewis*, 2 Man. & G. 197.

Exceptions sustained.

G. Wells, for the plaintiff.

G. M. Stearns & M. P. Knowlton, for Belcher.

F. E. FOOTE *vs.* HARTFORD FIRE INSURANCE COMPANY. SAME *vs.* HANOVER FIRE INSURANCE COMPANY. SAME *vs.* SPRINGFIELD FIRE AND MARINE INSURANCE COMPANY.

Hampden. Sept. 29, 1875. — Jan. 4, 1876. AMES & DEVENS, JJ., absent.

A policy of insurance against fire, which provided that it should be void if any change took place in the title or possession of the property, whether by sale, transfer or conveyance, legal process or judicial decree, was made to the owner of an equity of redemption, payable in case of loss to the "mortgagee, as his interest may appear." The mortgagor afterwards conveyed his interest in the premises by quitclaim deed to the mortgagee, and at the same time took back a bond for a reconveyance of the same to him, his heirs and assigns, upon the payment of a sum named, which was the amount then due on his mortgage. The bond was not acknowledged or recorded, and the insurer had no notice of the existence of either the deed or the bond until after the premises were destroyed by fire. After the delivery of the deed and bond, and until the fire, the mortgagor occupied a part of the building without payment of rent, paid taxes, made repairs, controlled the occupation of the other tenants, and until four months before the fire collected the rents and paid them over to the mortgagee. After that the mortgagee collected the rents, but had nothing else to do with the premises. The debt secured by the original mortgage had not been paid. The mortgagee brought an action to recover for the loss by fire. *Held*, the Gen. Sts. *c.* 89, § 15, providing that an absolute conveyance shall not be defeated or affected by an unrecorded defeasance "as against any person other than the maker of the defeasance or his heirs or devisees, or persons having actual notice thereof," that there was an alienation within the meaning of the policy.

ACTIONS OF CONTRACT upon three policies of insurance on the same building. The cases were tried together in the Superior Court before *Colburn*, J. The jury returned a verdict for the plaintiff in each case; and the defendants alleged exceptions, so much of which as is material to the point decided appears in the opinion.

A. L. Soule, for the defendants.

M. P. Knowlton, for the plaintiff.

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COLT, J. All the policies upon which these actions are brought contained, in substantially the same words, a provision which makes them void if any change takes place in the title or possession of the property, "whether by sale, transfer or conveyance, legal process or judicial decree." They were made to Pomeroy, who was then the owner of the equity of redemption, and were "payable in case of loss to F. E. Foote, mortgagee, as his interest may appear."

After the policies were issued, Pomeroy conveyed his interest in the premises by quitclaim deed to Foote, the plaintiff, and at the same time took back a bond for a reconveyance of the same to him, his heirs and assigns, upon the payment of a sum named, which was just the amount then due on his two mortgages. The bond was not acknowledged or recorded, and the defendants had no notice of the existence of either the deed or the bond until after the fire.

After the delivery of the deed and bond, and until the fire, in November, 1873, Pomeroy occupied a part of the building without payment of rent, paid taxes, made repairs, controlled the occupation of the other tenants, and up to June, 1873, collected the rents and paid them over to the plaintiff. After that, the plaintiff collected the rents, but had nothing else to do with the premises.

The debts secured by the original mortgages had not been paid, the securities were not taken up, and were not discharged, otherwise than as affected by the giving of the quitclaim deed and the bond.

We are of opinion that Pomeroy's deed effected a change of title and possession in the property insured, within the meaning of these policies. The absolute record title passed by it to the plaintiff. He could convey the land, and give a good and indefeasible title as against Pomeroy. It was subject to attachment for his debts. He had all the rights, and was subject to all the liabilities, of owner as to all persons but Pomeroy. In these respects, the plaintiff's power over the land was greater than that which he had before the deed, as mortgagee. On the other hand, Pomeroy parted with all power to convey as mortgagor, and all right to enforce or defend his title against a stranger. In these and other respects, he had not the same title which a mortgagor

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has in law and in equity under a recorded mortgage. The deed carried with it also a legal change of possession, notwithstanding the grantor remained in the occupation of part or the whole of the premises.

The force of these considerations is not controlled by the suggestion that upon the production of the unrecorded bond of defeasance the deed would not in equity, as between the parties to it, be allowed to change the existing relation of mortgagor and mortgagee, so as to give an absolute title to the grantee. The question is as to the effect of the transaction upon a party without notice, who has an interest in the property by virtue of a contract of insurance, and who has stipulated that no change of title shall be made. The statute declares that an absolute conveyance shall not be defeated or affected by an unrecorded defeasance "as against any person other than the maker of the defeasance or his heirs or devisees, or persons having actual notice thereof;" Gen. Sts. *c.* 89, § 15; and it has been decided that one who holds under such a conveyance, but who has given an unrecorded bond of defeasance under which his grantor remains in possession, is liable, as owner, to be proceeded against for damages under the mill act. *Hennessey* v. *Andrews*, 6 Cush. 170. The decision is put solely upon the ground that by the statute the defeasance is wholly inoperative and void against any person but the maker and his heirs or devisees, or persons having actual notice, and shows that the provisions are not to be restricted to those who are in some sense parties to the deed, or can claim rights under it. And under a similar statute in Maine it was held that a policy, which provided that any change in the title to the property should avoid it, was made void by the absolute deed of the assured, though he took back a bond to reconvey which was not recorded. *Tomlinson* v. *Monmouth Ins. Co.* 47 Maine, 232.

Exceptions sustained.

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JOSEPH BRAINARD *vs.* GEORGE FOWLER.

Hampden. Sept. 29, 1875.—Jan. 4, 1876. AMES & DEVENS, JJ., absent.

A judgment of a court of general jurisdiction in another state may be proved by a duly certified copy of the "transcript of judgment," which simply contains a copy of the summons to the defendant to answer in a plea of trespass on the case in assumpsit; a return of the officer thereon, showing personal service on the defendant; a copy of the plaintiff's declaration and statement of his claim; a copy of the "continued docket entry," showing, under the names of the parties, the issuing of the summons, filing of the plaintiff's declaration and statement, and entry of judgment; and a copy of the "judgment docket entry," showing, under the names of the parties, the date of the judgment, the amount of the debt, and the amount of the costs.

In an action on a judgment obtained in another state, in which the record shows that the defendant was duly summoned to appear, evidence that the defendant did not owe the plaintiff anything is not competent on the issue whether service was made on the defendant, nor on the issue whether the claim in the other state was fraudulent; and the evidence is not made admissible by the fact that the officer, who appeared by the record to have made the service, testified that when he made the service the defendant said the claim was a just one.

CONTRACT upon a judgment recovered by the plaintiff against the defendant in the Court of Common Pleas of Luzerne County in the State of Pennsylvania.

At the trial in the Superior Court, before *Colburn*, J., the plaintiff offered in evidence a copy of the proceedings in an action brought by him against the defendant in said court, entitled "transcript of judgment," which contained the following: A summons to the defendant to answer in a plea of trespass on the case in assumpsit; a return of the officer thereon, certifying that he had served the writ upon the defendant by delivering to him a true and attested copy of the writ, and by making the contents known to him; the plaintiff's narr. or declaration, and statement of his claim, which was for whiskey sold and delivered to the defendant; a copy of the "continued docket entry," under the names of the parties, as follows: "Summons in trespass on the case in assumpsit, Exe't. 29 July, 1869. Same day narr. and statement filed. Summoned, 23 Aug. 1869. Judg't Sec. Reg. J. D. No. 18;" also a copy of the "judgment docket entry," under the names of the parties, as follows: "Date of Judg't, 23d Aug. 1869. Debt, $176.32. Costs, $12.10."

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The defendant objected to the introduction of said transcript in evidence, because it was not properly authenticated; but as this objection was waived at the argument, it is unnecessary to state the form of the certificate annexed. He further objected, because it contained no sufficient record or statement of a judgment or adjudication against the defendant. The judge overruled said objections and admitted it in evidence.

The evidence of the defendant was his own testimony alone, and consisted of a denial that he was ever served with any process in the case of the plaintiff in Pennsylvania. He testified that he was and is a hotel keeper, and, at the time this alleged judgment was recovered, kept a hotel in Carbondale, Luzerne County, Pennsylvania, and continued so to do until May, 1870, and to reside there until March, 1871, when he removed to Massachusetts.

The defendant offered to show, upon the issue of service, that the plaintiff had no occasion to sue him, that he did not owe him anything, and the circumstances and details of the business he had with the plaintiff concerning the whiskey named in the plaintiff's complaint in the Pennsylvania action; and that the plaintiff had no claim upon him, and must have known such to be the fact. The judge excluded the evidence, but permitted the defendant to testify that he had had no dealings with the plaintiff, if such was the fact, but the defendant could not so testify.

The defendant then offered the same evidence upon the issue of fraudulently procuring the judgment, and the judge again excluded the evidence. He also offered to show that while he remained in Pennsylvania, he had property in his own name which could have been reached to satisfy a judgment, and that no attempt was ever made to collect this judgment. The judge excluded the evidence.

After the defendant had testified, the plaintiff put in the deposition of the officer named in the judgment record above named, whose answer to the fourth interrogatory was as follows: "I met said Fowler at that time and served a copy of a writ I had against him in favor of one Joseph Brainard, and after I had served the writ on him, said Fowler, he (Fowler) said the claim of Brainard was for a bill of liquors, and that the claim was all right, and that he intended to pay for it."

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The defendant was then recalled, and testified that he had no such conversation with the deponent. He then offered to testify that in fact Brainard had no bill for liquors against him, and the claim was not in fact all right. The judge excluded the evidence. This was all the evidence in the case.

After the evidence was all in, the defendant asked the judge to rule that the introduction of said transcript or copy did not make a *primâ facie* case for the plaintiff, but the judge ruled that it did.

The jury found for the plaintiff; and the defendant alleged exceptions.

G. M. Stearns, for the defendant. 1. The whole evidence is stated, and it appears that the laws of Pennsylvania were not in the case. The effect of the record is to be judged, therefore, by our own law, and it must show a "final judgment of the court;" and contain such statement as to imply "action of the judge and not merely of the clerk." *Knapp* v. *Abell*, 10 Allen, 485. In the case at bar, the papers show no trial or default, or assessment of damages, or adjudication. It was, therefore, error to rule that such a record made a *primâ facie* case for the plaintiff.

2. The court should have admitted upon the issue of service the evidence offered. The defendant is not "confined to a bare denial of the fact that service was made on him." He may show "his relation to the parties and cause of action." *McDermott* v. *Clary*, 107 Mass. 501.

3. The evidence offered was competent upon the issue of fraudulently procuring the judgment. The fact that the claim upon which the judgment was obtained was groundless and fictitious, tended to show that the judgment was obtained by imposition and misrepresentation. *Wilkinson* v. *Hall*, 6 Gray, 568.

4. It was competent to prove, in reply to the officer's deposition, what the facts were as tending to show which version of the disputed conversation was correct. *Commonwealth* v. *Howe*, 9 Gray, 110. The testimony of the officer was the narration of a confession of the existence of facts that bore upon the question of service. The defendant was entitled to prove that those facts did not exist, and to show that the bill was not all right and one that was a fair cause of action. *Commonwealth* v. *Howe*, 2 Allen, 153.

H. B. Stevens, for the plaintiff.

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MORTON, J. It is not now denied that the record of the Court of Common Pleas for Luzerne County in the State of Pennsylvania, offered in evidence by the plaintiff, was duly authenticated according to the statutes of the United States and of this Commonwealth. U. S. Sts. 1790, *c.* 11; 1804, *c.* 56. Gen. Sts. *c.* 131, § 61. It is not extended with the formality and accuracy required in the records of our own courts, but it is sufficient in substance and contains all the essential requisites of a judicial record. It shows the parties to the suit, the subject matter of the suit, jurisdiction over the parties, a final judgment of the court for fixed sums in damages and costs and the date of the judgment. *Knapp* v. *Abell*, 10 Allen, 485. It was therefore rightly admitted in evidence.

It appeared at the trial in the Superior Court, that at the time the suit in Pennsylvania was commenced and at the time judgment therein was rendered, both parties were residents of that state and subject to the jurisdiction of its courts. The record of the former suit shows that personal service was made upon the defendant. As the court had jurisdiction of the subject matter and of the parties, the judgment was conclusive against the defendant in Pennsylvania, and it is difficult to see how he could, by removing to another state, acquire the right to impeach it by proof that no service was made on him, or that it was fraudulently obtained. *Carleton* v. *Bickford*, 13 Gray, 591. *Ewer* v. *Coffin*, 1 Cush. 23. *Hall* v. *Williams*, 6 Pick. 232. But it is not necessary to decide that question. The Superior Court ruled that the record made a *primâ facie* case for the plaintiff, and permitted the defendant to introduce evidence upon the issues of service of the original writ upon him, and of fraud in obtaining the judgment. Upon those issues, the defendant offered to show that he did not owe the plaintiff anything, and the court properly rejected the evidence. It has no tendency to contradict the return of the officer, whose duty it was to serve the writ without any inquiry as to the justice of the claim. The ground that the defendant did not owe the debt should have been taken in the former suit. Upon this the judgment is conclusive, and the defendant cannot re-try the merits of the case, by alleging that it was fraudulently obtained

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Nor was this evidence made admissible by the fact that Barton in his deposition stated that when he served the writ upon the defendant, the defendant said that the claim was all right and he intended to pay it. This statement was upon a point which was collateral and immaterial, and does not give the defendant the right to prove that there was no cause of action upon which the judgment was founded. The other exception to the exclusion of testimony that the defendant had property in Pennsylvania which might have been taken on the judgment, is not insisted on, and is groundless. *Tracy* v. *Maloney*, 105 Mass. 90.

Exceptions overruled.

LEONARD C. STETSON *vs.* GEORGE E. CURTIS.

Plymouth. Jan. 6, 1875. — Jan. 4, 1876. AMES, J., absent.

The owner of a large tract of land fronting on a road, through which land an open space of irregular width, varying from forty-eight to fifty-three feet, bounded on the sides by trees, fences and buildings, extended from the road back to other lands of the grantor, and was used for access to these lands, conveyed one of them by a deed containing the following clause following the description in the deed: "I hereby covenant, for myself, my heirs and assigns, that a carriage way at least twenty-five feet wide shall forever hereafter be kept open and unobstructed from said lot easterly to" the said road. In an action of tort by the grantee of the lot for the obstruction of the way, the defendant did not deny that the plaintiff was entitled, under this clause, to an unobstructed way at least twenty-five feet wide, but contended that no location of the way had ever been made under it, and asked the judge to rule that if a way twenty-five feet wide had since his occupation been always left open, he was entitled to a verdict. The judge declined so to instruct the jury, and instructed them that if, when the deed was given, a carriage way defined by visible objects had been previously located by the grantor, they might find that such way was intended to be secured to the grantee, although it was forty-five feet wide. *Held*, that this instruction gave the defendant good ground of exception.

TORT for obstructing a right of way. At the trial in the Superior Court, before *Brigham*, C. J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, the substance of which appears in the opinion.

B. W. Harris & P. E. Tucker, for the defendant.

J. White & C. S. Sumner, for the plaintiff.

COLT, J. The rights of the parties in this case depend upon the construction to be given to a clause in the deed given in

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1834 by John Wales to Bela Keith, under whom the plaintiff claims, which provides for a way across land now owned by the defendant, to the land then conveyed, and now owned by the plaintiff. It is in the following words: "I hereby covenant for myself, my heirs and assigns, that a carriage way at least twenty-five feet wide shall forever hereafter be kept open and unobstructed from said lot easterly to the Boston and New Bedford road." The clause follows the description in the deed, and is treated by both parties as having the effect of a grant of a right of way appurtenant to the lot conveyed. The question is as to its location and width.

It was not denied by the defendant that under this clause the plaintiff was entitled to an unobstructed way at least twenty-five feet wide, but he contended that no location of the way had ever been made under it, and he asked the court to rule that if a way twenty-five feet wide had, since his occupation, been always left open, he was entitled to a verdict. But the court instructed the jury in substance: First, that, as the way was not located by the deed, if they should find that it had never been otherwise definitely located, then the plaintiff could not maintain his action, unless he had been deprived of a way at least twenty-five feet wide from his lot to the street. But, secondly, if, when the deed was given, a carriage way, defined by visible objects, had been previously located by the grantor, they might find that such way was intended to be secured to the grantee, although it was forty-five feet wide. Or, thirdly, if the way was not thus located, and the grantee or the plaintiff, after he became owner, had appropriated to his own use, under this deed, a carriage way of defined limits, with the knowledge and acquiescence of the defendant or those under whom he claimed, which had remained open for a long period of time, even if such way was forty-five feet wide, the jury might find that the plaintiff was entitled to a way of that width.

The accuracy of these instructions depends upon the nature and limits of the right acquired under the deed by the grantee and his assigns. The deed is to be construed by applying its terms to the situation and condition of the property at the time. The grantor then owned a large tract of land, fronting on the New Bedford road, through which an open space of irregular

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width, varying from forty-eight to fifty-three feet, bounded on the sides by trees, fences and buildings, extended from the street back to the lot conveyed. This space was used for access to the grantor's other lands, including the lot conveyed. A right of way was to be secured to the comparatively small lot then sold. If it had been intended to create a right over a way of defined limits already in existence, or to give a right to the grantee to locate a way, the appropriate words for the grant of such way would have been employed. Instead of that, the right is secured in the form of a covenant, which is allowed to have the effect of a grant only in order that the intention of the parties may not be defeated. The form thus adopted must be regarded as important in arriving at the true meaning of the deed and determining the character of the rights secured. By the terms of this covenant, as we understand it, the grantor undertakes, for himself, his heirs and assigns, always to keep open and unobstructed a way suitable for the use of carriages, which, if reasonably required for such use, may be more than twenty-five feet wide, but shall never be less than that. This gives some force and meaning to the words "at least twenty-five feet wide," and is inconsistent with the supposition that the grantor intended to devote the whole of the forty-five feet in width to the use of the proposed way, even if the whole was then used as a way for access to his other land. He has performed the contract if he keeps open the way described, and has the right to restrict the grantee or those claiming under him to such a way whenever he chooses. A qualified easement was created which was subject to this right of the owner of the servient tenement. *Rowbotham* v. *Wilson*, 8 H. L. Cas. 348, 362. Gale & Whatley on Easements, 47. *Spencer's Case*, Smith's Lead. Cas. (7th Am. ed.) 137, and notes.

The case is not like *Salisbury* v. *Andrews*, 19 Pick. 250. There a right was given to pass through Central Court, a place which was laid out, had acquired a reputation, and was known by that name. It was thought not to be a forced construction to regard the term Central Court as including all that had been previously laid out, paved and fitted for the use of the houses upon it. And it was held that the grant was of a way limited and defined, and not of a convenient way to be subsequently defined.

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It is a familiar rule that, when a right of way is granted without defined limits, the practical location and use of such way by the grantee under his deed, acquiesced in for a long time by the grantor, will operate as an assignment of the right. *Bannon* v. *Angier*, 2 Allen, 128. But this rule, which is a rule of practical construction adopted to ascertain the intent of the parties, will not be permitted to defeat an intention fairly expressed in the terms of the grant controlling the future location.

In view of the law thus stated, the second instruction should not have been given. The fact that the grantor had laid out a way defined by visible objects, if that way was forty-five feet wide, would not necessarily justify the jury in finding that such way was the way intended by the parties to the deed. This would defeat, as we have seen, the plain intention of the deed. A new trial must therefore be ordered, and it is not necessary to consider the other instructions. *Exceptions sustained.*

JOSEPH SIMPSON & another *vs.* JOHN DAVIS.

Bristol. Oct. 28, 1875. — Jan. 4, 1876. MORTON, J., absent.

In an action upon a promissory note, in which the declaration alleges that the defendant made the note, and the answer denies this and alleges an alteration, proof of the defendant's signature is *primâ facie* evidence that the whole body of the note written over it is the act of the defendant, but the burden of proof is on the plaintiff to show that the note declared on was the note of the defendant.

CONTRACT upon a promissory note, of which the following is a copy: "$400. Fall River, Dec. 29th, 1873. For value received, I promise to pay Abel R. Davis or order four hundred dollars, with interest, six months after date. John Davis." Indorsed, "Abel R. Davis." The answer contained a general denial and alleged that "there has been a material alteration in said note since it was given, if it shall appear it was given by the defendant."

At the trial in the Superior Court, before *Pitman*, J., without a jury, the signature of the defendant was admitted, and there

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was evidence tending to prove the genuineness of the indorsement. The plaintiffs thereupon rested.

The defendant then offered evidence tending to show that the words "six months after date" were not in the note when signed and delivered by him, but had been added since, without his knowledge or assent. Testimony to the same point was also introduced by the plaintiffs in rebuttal. The plaintiffs contended that the burden of proof was on the defendant to establish and prove said alteration, but the judge ruled "that the proof of the signature of a party to a note is *primâ facie* evidence that the whole body of the note written over it is the act of said party; but that such proof is merely *primâ facie*, that when, as in the present case, proper pleadings present the issue, the plaintiffs are bound to prove affirmatively that the note declared on and put in proof is substantially the note made by the defendant; and that, when proof has been offered by the defendant tending to show a material alteration, the burden of proof is with the plaintiffs, to satisfy the court, or jury, upon the whole case, that the note so declared on was in substance and effect the note of the defendant."

The judge found for the defendant; and the plaintiffs alleged exceptions.

N. Hatheway & H. K. Braley, for the plaintiffs.

J. M. Morton, Jr. & J. M. Wood, for the defendant.

ENDICOTT, J. The plaintiffs allege in the declaration that the defendant made the note declared on. This the defendant denies, and says that there has been an alteration of the note since it was given. If an alteration was made after its execution and without the defendant's consent, the note declared on is not the note of the defendant. The plaintiffs must establish that it is this defendant's note, and on this proposition the plaintiffs have the burden of proof throughout. The plaintiffs rely upon the words of Shaw, C. J., in *Davis* v. *Jenney*, 1 Met. 221, 224: "that an extension of the time was a material alteration, and that the burden of proof was upon the defendant to show the alteration." That the words are not here used in their technical sense, is evident from the paragraph that follows: "or perhaps to state this last proposition with a little more precision, the proof or admission of the signature of a party to an instrument is *primâ facie* evidence

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that the instrument written over it is the act of the party; and this *primâ facie* evidence will stand as binding proof, unless the defendant can rebut it by showing, from the appearance of the instrument itself, or otherwise, that it has been altered." In *Wilde* v. *Armsby*, 6 Cush. 314, it was held that the burden of proof was on the plaintiff to show that an interlineation was made before the instrument was executed. The same rule applies as when a want of consideration is relied on as the defence to a promissory note; the burden of proof is on the plaintiff, upon the whole evidence, to establish that fact. *Delano* v. *Bartlett*, 6 Cush. 364. *Morris* v. *Bowman*, 12 Gray, 467. *Powers* v. *Russell*, 13 Pick. 69, 76. The ruling at the trial was correct.

Exceptions overruled.

NATHANIEL K. JOHNSON *vs.* IRA G. BEAN.

Essex. Jan. 28, 1875. — Jan. 4, 1876. AMES, J., absent. ENDICOTT, J. did not sit.

On the trial of a writ of entry, the demandant claimed title to the land in question as part of a lot conveyed by A. to B., and by B. conveyed to him. At the time of each of these conveyances, the land demanded was separated from the rest of the land conveyed by a substantial fence extending across the rear of the lot. The tenant's dwelling-house stood upon it, and there was no fence between it and the tenant's adjoining lot in the rear, but the whole was used as one house lot in the exclusive and actual possession of the tenant, which was adverse, under a claim of title, open and notorious. The title which A. had in the premises was acquired by quitclaim deed from the tenant and by the foreclosure of a mortgage while in his hands, which had been assigned to him. At the time of the quitclaim deed, A. gave possession of the premises to the tenant under an agreement of purchase, which was soon given up, and possession was taken by A. of all except the strip of land in dispute. The mortgage was foreclosed before A.'s deed to B. *Held*, assuming that the deeds included in their descriptions the land in question, that the grantors in those deeds were disseised, and that nothing passed by them.

WRIT OF ENTRY to recover a parcel of land in Haverhill. Plea, *nul disseisin*. At the trial in the Superior Court, *Wilkinson*, J., ruled that the demandant could not maintain the action, directed the jury to return a verdict for the tenant, and reported the case for the consideration of this court. So much of the case as is material to the point decided appears in the opinion.

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J. W. Perry, for the demandant.

N. C. Berry, for the tenant.

COLT, J. The demandant claims title to the land in question as part of a lot conveyed to one Carlton by one Stowell, and by Carlton conveyed to him. At the time of each of these conveyances, the land demanded was separated from the rest of the land conveyed by a substantial fence extending across the rear of the lot; the tenant's dwelling-house was in fact located upon it; and there was no fence between it and the tenant's adjoining lot in the rear, but the whole was used as one house lot, then in the exclusive and actual occupation and possession of the tenant. This possession the case shows was adverse, and under a claim of title, it was open and notorious, and must be presumed to have been known to the rightful owner. If it had continued for a sufficient time, it would have ripened into a good title by presumption of grant. *Samuels* v. *Borrowscale*, 104 Mass. 207. *Parker* v. *Proprietors of Locks & Canals*, 3 Met. 91, 100. *Boston & Worcester Railroad* v. *Sparhawk*, 5 Met. 469.

The title which Stowell had in the premises was acquired, as it is claimed, by quitclaim deed from the tenant, and by the foreclosure of a mortgage while in his hands, which had been assigned to him. For the purposes of this case, we assume, without deciding, that these deeds and the deeds under which the demandant claims title include the demanded premises in their several descriptions. And yet the demandant fails to show title, because, at the time of the delivery of the deeds under which he claims, the grantors were disseised, and, by a familiar rule, no title passed.

It is no answer to this, that, at the time of the tenant's quitclaim deed to him, Stowell gave possession of the premises to him under an agreement of purchase; for the uncontradicted testimony in the case shows that this arrangement for a repurchase was soon given up and possession taken by Stowell of all except the strip of land in dispute. The mortgage was foreclosed, and the alleged permissive character of the tenant's occupancy was terminated before Stowell's deed, which was a warranty deed, with full covenants of title. The rule that a mortgagor or one claiming under him cannot disseise a mortgagee is not to be applied, because Stowell had then become absolute owner by an

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indefeasible title, and it is well settled that a grantor may disseise a grantee. *Stearns* v. *Hendersass*, 9 Cush. 497. *Barry* v. *Adams*, 3 Allen, 493.

The disseisin on which the tenant relies derives its character from and was the necessary result of a mistake as to the bounds and effect of the several deeds; and although it would not be sufficient as against a mortgagee's title, or while a relation of tenancy existed, yet, when the mortgage title becomes absolute and the tenancy is ended, there is no reason why it should not be held effectual to defeat the title of the demandant.

For these reasons we see no ground for disturbing the ruling of the Superior Court. *Judgment on the verdict*

GEORGIANA A. MONIES *vs.* CITY OF LYNN.

Essex. Nov. 8, 1875. — Jan. 8, 1876. COLT & MORTON, JJ., absent.

In an action against a city to recover for injuries occasioned by a defective highway, evidence that a boy sixteen years old, who had been employed to light and extinguish the street lamps, and had received a general direction from his superior to shut off the gas at midnight, was told of the existence of the defect just before the accident, and as he was in the act of extinguishing the lights, and that, although warned, he put out the lights and neglected to barricade the spot, will not warrant the jury in finding that the city had notice of the defect.

Where, in an action against a city to recover for injuries occasioned by a defective highway, the issues are whether the defect had existed for twenty-four hours, and whether the city had notice of the defect, and the jury find specially that the defect had existed for twenty-four hours, and return a general verdict for the plaintiff, it is within the power of the judge to set the special finding aside, and to permit the general verdict to stand.

TORT for personal injuries occasioned by an alleged defect in a highway in the defendant city.

At the trial in the Superior Court, before *Brigham*, C. J., it appeared that a sidewalk caved in in the night-time, and that about an hour and a half afterwards the plaintiff, while in the exercise of due care, fell into the hole. The plaintiff claimed to recover on the ground that the sidewalk had been undermined for twenty-four hours, and also on the ground that the city had notice of the defect. The evidence on the last point appears in the

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opinion. The jury found specially that the defect had existed for twenty-four hours, and returned a verdict for the plaintiff. The judge set aside the special finding, but refused to set aside the verdict. The defendant alleged exceptions to the refusal of the judge to rule that the evidence of notice was not sufficient to entitle the plaintiff to a verdict, if the defect had not existed for twenty-four hours; and the plaintiff alleged exceptions to the order setting aside the special finding.

E. T. Burley, (*E. J. Sherman* with him,) for the plaintiff.

S. B. Ives, Jr., for the defendant, was not called upon.

AMES, J. Upon the assumption that the presiding judge, in the exercise of his discretion, had the right, if he thought justice so required, to set aside the special finding of the jury upon the question whether the defect in the street had existed for the space of twenty-four hours at the time of the accident, the only remaining ground upon which the plaintiff's claim could be maintained would be that the defendant city had had reasonable notice of the defect. The evidence upon this point was that a boy of the age of sixteen years, who had been employed to light and extinguish the street lamps, and who had received a general direction from his superior to shut off the gas at midnight, was told of the existence of the defect just before the accident, and as he was in the act of extinguishing the lights. The plaintiff does not claim either that there was notice to any proper officer of the city whose duty it was to attend to municipal affairs, or that notice to the city can be inferred in this case from the notoriety or long continuance of the defect. It is to be remembered that the defendant was under no legal obligation to cause its streets to be lighted for the security of travellers; *Randall* v. *Eastern Railroad*, 106 Mass. 276; and there is no complaint that a general regulation for shutting off the gas at midnight was unreasonable or improper. The lamplighter was merely a laborer, employed to do a specific thing, intrusted with no discretionary power, and under no responsibility except to act in obedience to orders. The case differs from one in which workmen are employed by the city to make excavations in a street for the construction of a sewer or the laying down of water or gas pipes, or for repairs of the way. In such cases, the act of breaking up the street or way is the act of the city, and the negligence of the

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workmen in placing suitable lights or barriers is the negligence of the city. There is no occasion to prove actual notice to a city or town of its own acts, or of acts which are constructively its own. *Brooks* v. *Somerville*, 106 Mass. 271.

But it is a mistake to say that the extinguishment of the light at that particular time was the act of the city, in such a sense as to carry with it the responsibility for the accident which ensued. If the city authorities were not bound to keep a light at all, they were not wrongdoers in keeping no light after midnight. If they had shut off the gas by closing a valve at some point remote from the scene of the accident, it would not be claimed that they thereby became responsible for the injury that followed. The hand of the lamplighter was merely a part of the machinery for accomplishing the same end. Nothing was left to his judgment as to the condition of the street, or the necessity of erecting barriers, or taking any other precautions for the safety of travellers. Notice to him, therefore, was merely the same in legal effect as notice to any other casual passer-by, having no responsibility or duty in the matter.

We think that it was within the power of the judge to set aside the special finding of the jury as to the length of time that the defect had lasted. He could, if he thought justice required it, have set aside the verdict entirely, and his refusal to do so was in fact a concession to the plaintiff. He thereby left to her a chance to stand upon the only ground upon which he believed the verdict could be sustained. As the whole includes all its parts, the power to set aside the entire verdict must carry with it the power to set aside any specific finding upon any separate question submitted to the jury; and there is nothing to show that it was erroneously exercised on this occasion.

Plaintiff's exceptions overruled; defendant's exceptions sustained.

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LYDIA C. TUTTLE *vs.* CITY OF LAWRENCE.

Essex. Nov. 8, 1875. — Jan. 4, 1876. COLT & MORTON, JJ., absent.

In an action against a city for injuries occasioned by a defective highway, if it appears that the plaintiff was driving at the time, and that there is an ordinance of the city prohibiting the driving of a vehicle in the streets of the city at a greater rate of speed than six miles an hour, the burden of proof is on the plaintiff, upon the issue of due care, to show that at the time of the injury he was not violating the ordinance.

In an action against a city for injuries occasioned by a defective highway, one issue was whether the plaintiff's horse was going at an improper rate of speed. A witness for the plaintiff testified, on cross-examination, that the horse was short-gaited, and looked as if he was travelling faster than he really did go. The defendant then asked the witness "What was his speed?" not for the purpose of showing the specific speed at the time of the accident, but to show the horse's ability for speed, and to control the testimony of the plaintiff's witness in cross-examination. *Held*, that the refusal to allow this question to be put afforded the defendant no ground of exception.

In an action against a city for injuries occasioned by a defective highway, a witness who saw the plaintiff driving in a sleigh at the time of the accident, was asked if it was possible for the sleigh, at the angle it was crossing a railroad track, to have gone into an excavation, which was the alleged defect. *Held*, that the refusal to allow this question to be put afforded the defendant no ground of exception.

TORT for personal injuries occasioned by an alleged defect in a public street in Lawrence, called Essex Street, which the defendant was bound to keep in repair. Trial in the Superior Court, before *Brigham*, C. J., who allowed a bill of exceptions, in substance as follows:

The defect complained of was caused by the Merrimack Horse Railroad Company having laid tracks, under its charter and with the consent of the city of Lawrence, through Essex Street, said defect consisting of an excavation in the snow, caused by ploughing out the snow over said tracks for the purpose of running the cars of said company.

The plaintiff offered evidence tending to prove that on December 26, 1872, she was driving in a sleigh, the horse attached to which was driven by her son-in-law down Broadway, a street at right angles with Essex Street; that she turned from Broadway into Essex Street, and near the corner crossed Essex Street diagonally, and while so crossing, the right hand runner of her sleigh sank into the excavation over the right hand rail of said

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sompany, by means of which the sleigh was upset and she was injured. She also offered evidence tending to prove that the horse was driven at a moderate rate of speed, not exceeding five miles an hour.

The defendant contended and offered evidence that the horse was driven at a very much higher rate of speed, namely, at the rate of ten miles an hour, and that the injury received by the plaintiff was occasioned by driving at a high rate of speed, and that the sleigh was upset by coming quickly round the corner of Essex Street and Broadway.

One of the witnesses called by the plaintiff, on cross-examination, testified, that the horse was what is called a short-gaited horse, and that in travelling he looked as if he was going much faster than he really did go, and that he could not be possibly driven faster than at the rate of a mile in four minutes. The defendant's counsel thereupon proposed this question to the witness: "What was his speed?" Upon the plaintiff's objection, the judge would not permit this question to be answered. This evidence was offered, not to show the specific speed of the horse at the time of the accident, but to show the horse's ability for speed, and to control the testimony of the plaintiff's witness in cross-examination upon that subject.

The defendant called two witnesses who saw the plaintiff as she drove into Essex Street, and saw the course in which she drove across said Essex Street, and they were asked if it was possible for the sleigh, at the angle at which it was crossing the track, to have gone into the excavation aforesaid. The question was objected to, as incompetent in substance, and was excluded.

The defendant put in evidence an ordinance of the city, prohibiting the driving of any vehicle through any of its streets at a rate faster than six miles an hour, and offered evidence tending to prove that at the time of the accident the plaintiff was driving at a speed much higher than that allowed by the city under said ordinance. Upon the matter of this ordinance, the judge ruled, at the plaintiff's request, as follows: "The burden is upon the plaintiff to satisfy the jury, by a fair preponderance of the evidence, that at the time of the accident the driver of the vehicle was in the exercise of due care, that is, such care as a prudent man in

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like circumstances would exercise; but if the defendant claims that the plaintiff is barred of her right to recover, by the fact that the driver of the vehicle was violating an ordinance of the city of Lawrence, the burden is upon the defendant to show the facts necessary to show such a violation."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

C. Saunders & C. G. Saunders, for the defendant.

W. S. Knox, for the plaintiff.

ENDICOTT, J. A city ordinance, prohibiting the driving of any vehicle in the streets of the city at a greater rate of speed than six miles an hour, is binding upon all persons driving within the city, as any statute or other law of the Commonwealth; and to drive faster than the prescribed rate is a violation of law. *Heland* v. *Lowell*, 3 Allen, 407. It appearing in this case that the city of Lawrence had passed such an ordinance, it was incumbent on the plaintiff to show that she was not violating it. If at the time of the accident she was doing an unlawful act, and that unlawful act contributed to cause the alleged injury, she was not in the exercise of that due care which she is obliged to prove in order to recover. The allegation of due care implies not only that the plaintiff was not negligent, but also that she was not acting in violation of law when the alleged injury occurred. The fact of due care on the part of the plaintiff was directly in issue; it was alleged in the declaration and denied in the answer. On that issue the plaintiff had the burden of proof, and if she failed to sustain the burden, she must fail in her action. *Bosworth* v. *Swansey*, 10 Met. 363. *Jones* v. *Andover*, 10 Allen, 18. *Wright* v. *Malden & Melrose Railroad*, 4 Allen, 283, 290. *Worcester* v. *Essex Merrimac Bridge*, 7 Gray, 457. We are therefore of opinion that the learned judge erred in ruling that the burden of proof was on the defendant to show that the plaintiff was violating the city ordinance by driving more than six miles an hour when she met with the injury complained of.

We see no ground of exception to the rulings on the admissions of evidence. It was clearly within the discretion of the presiding judge to limit the inquiry as to the speed that the horse was capable of going. *Stone* v. *Hubbardston*, 100 Mass. 49. It was offered to contradict statements elicited on cross-examination, and

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does not appear to have had any necessary bearing upon the rate of speed the horse was travelling at the time of the accident.

Nor was it proper to ask a witness, who saw the accident, if it was possible for the sleigh, at the angle at which it was crossing the horse railroad track, to have gone into the excavation. The witness was not asked to state what he saw, but to give his opinion as to what would happen or be likely to happen under given circumstances.

As the ruling on the burden of proof was erroneous, the entry must be *Exceptions sustained.*

CHARLES C. HARVEY *vs.* IRA HUNT.

Essex. Nov. 3, 1875. — Jan. 4, 1876. COLT & MORTON, JJ., absent.

In an action by the payee against the maker upon a promissory note, there was evidence that, before the making of the note, the plaintiff agreed to take thirty-five per cent. of his debt and sign a composition deed, and that he afterwards deposited his claim with an attorney, to whom the defendant, induced by fear of an attachment of his property, paid a part of the whole claim in cash, and the rest by the note in suit; that the plaintiff afterwards signed a composition deed, by which the creditors agreed to take thirty-five per cent. of their claims, which was signed by "substantially all" the creditors, and was to be void unless the compromise was paid within seven days after the date of the deed. The plaintiff's signature to the deed was affixed after the expiration of the seven days, and his signature preceded those of a majority of the creditors who signed. The presiding judge instructed the jury that if, after the plaintiff agreed to sign with other creditors of the defendant the deed of composition, the plaintiff's attorney, by threats of an attachment, collected of the defendant in cash a sum equal to or larger than the sum agreed in the deed to be taken in discharge, and obtained the note declared on and delivered it to the plaintiff, who in consideration that he had thus received the full amount of his debt, affixed his signature to the deed, the jury would be warranted in finding that the note was without consideration; that if there was no relation between the plaintiff's signing the deed and the giving the note, and if this was an independent contract for the payment of the defendant's debt to the plaintiff, irrespective of any promise to sign the same and of the act of signing, the note was for a good consideration. *Held*, that the evidence justified the jury in finding that the note was signed upon the understanding that the deed should be signed. *Held*, also, that the instruction was correct. *Held*, also, that the validity of the consideration was to be tested by the object with which the contract was entered into, and not by the number of persons actually deceived by the plaintiff's signature.

CONTRACT upon a promissory note, dated Haverhill, May 20, 1873, payable sixty days after date, to the order of the plaintiff,

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and signed by the defendant. The answer alleged that the note was without consideration and fraudulent, and that the plaintiff was one of many creditors who signed a deed of composition, by which they agreed to accept thirty-five per cent. of their claims in full satisfaction thereof. By a copy of the deed annexed, it appeared that it was signed by forty-two creditors, and that the plaintiff's signature was the ninth in the list of signatures. The deed was dated May 7, 1873, and provided that it should be void unless the compromise was paid within seven days from that date.

At the trial in the Superior Court, before *Brigham*, C. J., the defendant admitted that he signed the note declared on, and the plaintiff read the note to the jury and rested his case.

The defendant thereupon offered evidence tending to prove that, in April or May, 1873, he became insolvent, having during three years previously been engaged in the business of a grocer, in Haverhill, and that he proposed to his creditors, among whom was the plaintiff, to accept thirty-five per cent. of his indebtedness to them in full payment thereof; that the plaintiff with the other creditors of the defendant accepted this proposition, and the plaintiff signed the said composition deed to this effect, but that the plaintiff's signature was not affixed to the deed until after May 14, 1873, although before that time he orally agreed to sign the same if the other creditors did so; that before the plaintiff signed the deed, and after his oral promise to sign it, the plaintiff left his claim against the defendant with H. N. Merrill, an attorney at law in Haverhill, for collection; that the defendant told the attorney that the plaintiff had agreed to receive thirty-five per cent. of the amount of the claim thus left, in payment thereof, but that, induced by fear that his grocery store would be shut up by a process of attachment in a suit upon said claim, he paid it in full, paying to Mr. Merrill one half of it in cash, and the residue in the note declared on, and afterwards obtained the plaintiff's unconditional signature to the deed in the place where the plaintiff's signature appeared therein, and that the defendant paid thirty-five per cent. only of his indebtedness to all his other creditors, they having become parties to the composition deed, although six of them signed the same after May 14, 1873.

The plaintiff in rebuttal introduced evidence tending to prove that, at the time of the defendant's insolvency, he owed the plain-

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tiff more than $100, for flour sold him, through his selling agent, one Hatch; that when the defendant notified the plaintiff that he could not pay his debts, he referred him to Hatch, but did not agree conditionally or unconditionally to receive of him thirty-five per cent. of his indebtedness to him, in full payment thereof, or to sign the deed; that after May 24, 1873, the defendant came to the plaintiff, told him that he had received his pay in full, and that he would oblige him if he would sign the said composition deed for his accommodation, as the man who was to advance to him the money to settle with his creditors would not do so, unless all of his creditors signed the deed; that thus urged, the plaintiff signed the same, having at the time the note declared on, and the money paid by the defendant to Mr. Merrill, in his possession.

Upon the foregoing evidence the case was submitted to the jury; there being no evidence beside the defendant's personal testimony of the signing of the deed by the persons or partnerships whose names were affixed thereto, or of the agency of persons appearing to have signed the same as agents of persons or partnerships, except the evidence afforded by the deed itself.

The plaintiff objected to all testimony of the parties as to conversations prior to the execution of the deed by the plaintiff, except such as might refer to the note; and the testimony being in, the plaintiff suggested that there was no evidence connecting the making of the note with the execution of the deed, and moved that a verdict be ordered for the plaintiff, and his motion being overruled, thereupon requested the following instructions to the jury:

"1. That the execution of the composition deed set up in the defendant's answer and produced in evidence, at any time after the expiration of seven days from the date thereof, cannot bind the party so executing it to the terms thereof.

"2. That said deed was null and void, unless all the creditors of Ira Hunt had executed it, and had been tendered the several sums representing thirty-five per cent. of their respective claims within seven days from and after the date thereof.

"3. That the reception of the note before such execution could work no fraud upon the other creditors, such as could defeat the plaintiff's recovery in this action.

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"4. The fact that one of the creditors never executed said deed, vacates the same as to all who have executed it, unless with knowledge of such fact they afterward ratified it.

"5. Unless the defendant made the note declared on, upon condition that the plaintiff would afterward sign the deed, there is no fraud on the part of the plaintiff that can vitiate the note.

"6. That no verbal promise that the plaintiff would take thirty-five per cent. and sign the deed, if any such were made by him, is to be considered, unless such promise were made conditional upon the making the note in suit.

"7. That the plaintiff having received this note several days before he signed the deed, nothing short of an express promise on his part to sign the deed after the receipt of the note can affect such note with fraud."

The judge refused to give these instructions, and instructed the jury as follows: "If after the plaintiff had agreed to sign, with other creditors of the defendant, the deed for the composition of the defendant's debts, the plaintiff's attorney, by threats of suit or attachment of his property, collected of the defendant in cash a sum equal to or larger than the sum agreed by said creditors in said deed, to be taken in discharge of their claims, and obtained the note declared on, and delivered the same to the plaintiff, and the plaintiff, in consideration of the fact that he had thus received the full amount of his debt in cash and notes, affixed his signature to the composition deed, the jury would be warranted in finding that the note was without consideration. If there was no relation between the plaintiff's signing the composition deed and the giving the note declared on, and if this was an independent contract for the payment of the defendant's debt to the plaintiff, irrespective of any promise to sign the same and of the act of signing, the note was for a good consideration. The fact that the deed was signed by substantially all, but not by every one, of the defendant's creditors, or that the plaintiff did not sign the same until after May 14, are not material facts affecting this question of consideration of the note declared on."

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions to the instructions given, and to the refusal to rule as requested.

H. N. Merrill, for the plaintiff.

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P. W. Locke, for the defendant.

DEVENS, J. The presiding judge did not assume, as the plaintiff contends, but submitted to the jury the question whether the signature of the plaintiff to the composition deed was obtained by payment to him in full of his debt in cash, and by the note in suit. If this question was answered affirmatively, they were directed that they would be warranted in finding that the note was without consideration, while they were cautiously instructed that if there was no relation between the plaintiff's signing the composition deed and the giving the note declared on, and that if this was an independent contract for the payment of the defendant's debt to the plaintiff, irrespective of any promise to sign the same and of the act of signing, the note was for a good consideration.

There was evidence of the previous oral agreement by the plaintiff to take thirty-five per cent. of his debt, and of the subsequent deposit by him of his claim with the attorney, and of the payment of fifty per cent. cash, and the delivery of the note in suit by the defendant, induced by fear of an attachment, and of the subsequent signature of the composition deed by the plaintiff. This sufficiently connected the execution of the deed with the making of the note, and while there was no direct evidence of any understanding or agreement between the parties that when it was so made the deed should be executed, these circumstances, if they were proved, justified the jury in finding its existence.

Upon these facts the instructions were also correct. The payment of money by a debtor to some of his creditors in order to induce them to execute a deed of composition is a fraud upon all other creditors who sign it, as they become parties upon the understanding that all are to receive the same amount, and are influenced each by the other to believe that the composition is a fair and just one. A private arrangement by which the influence of one as expressed by his signature, is bought by promises of advantage peculiar to himself, operates to deceive all others. No contract therefore to pay money, or to do any other valuable thing on such consideration, can be enforced, and however formal the instrument may be by which it is expressed, parol evidence is always admissible to show the fraud and thus avoid it. *Case* v. *Gerrish*, 15 Pick. 49. *Ramsdell* v *Edgarton*, 8 Met. 227.

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Lothrop v. *King*, 8 Cush. 382. *Partridge* v. *Messer*, 14 Gray 180.

Nor had the instrument become void when the plaintiff signed it. Even if those who had signed it previously to May 14 would have been entitled to be released from it, if they so demanded, because of the failure to pay upon that day, it was entirely competent for them to waive this provision, and, as they received the thirty-five per cent. provided for by it, it must be deemed it was waived, as this would operate to reaffirm their signatures. While as to those who signed after May 14, who were apparently the larger number as shown by their signatures after that of the plaintiff, such signatures would clearly indicate a waiver of payment on that day.

Although the deed was not signed by all, but only by "substantially all" the creditors, this cannot make the consideration of this note good. Its validity is to be tested by the object with which the contract was entered into, and not by the number of persons actually deceived by means of it. *Gibbs* v. *Smith*, 115 Mass. 592. Even if creditors might have been entitled, either because the payments were not made on May 14, or because all had not signed the deed, to be released from the proposed composition, this would not affect the case. It is shown, however, that the deed was so largely signed that the composition was carried out; and the plaintiff's signature, which was obtained by reason of the private advantage which he sought to secure by his secret agreement, was in fraud of the just rights of those who were afterwards induced either to enter into or to complete the transaction.

Without discussing each of the numerous rulings requested by plaintiff, many of which do not seem to have been called for by any facts which appear on the bill of exceptions, the considerations to which we have adverted require us to hold that no error was committed in either those given or in refusing those which were declined. *Exceptions overruled.*

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JOHN H. PRESCOTT & another *vs.* GEORGE BATTERSBY & another.

Essex. Nov. 5, 1875. — Jan. 4, 1876. COLT & MORTON, JJ., absent.

The provision of the Gen. Sts. c. 49, § 131, that cities "may from time to time establish such ordinances as they deem expedient, with suitable penalties, respecting the appointment of surveyors of lumber therein," is not compulsory upon a city whose charter provides that it may establish such ordinances; and if such city fails to pass such ordinances, it still has the duty, under the Gen. Sts. c. 18, § 31, and c. 19, § 2, of appointing surveyors; and if, such ordinances not being passed, surveyors of lumber are yet appointed, and lumber is sold without being surveyed, numbered and marked, as required by the Gen. Sts. c. 49, § 143, the sale is void.

The St. of 1875, c. 153, applies only to sales of goods, wares and merchandise, by weights and measures, and not to sales of lumber.

CONTRACT for goods sold and delivered. The case was submitted to the Superior Court, and, after judgment for the defendants, to this court, on appeal, on the findings of an auditor, which were to be taken as an agreed statement of facts, and were in substance as follows:

The plaintiffs were, when the items set forth in their bill of particulars were sold and delivered, dealers in lumber in Lawrence, in this Commonwealth. The sales declared on were made in Lawrence. A part of the items declared on are boards and dimension lumber sold and delivered by the plaintiffs to the defendants. All of said boards and dimension lumber were brought into this state from other states of the Union by the plaintiffs for sale in the city of Lawrence, and were sold by the plaintiffs to the defendants, as to quantity or measure, by the surveyor's marks, so called, on the boards and lumber, put on before said lumber and boards were brought into this state. Said boards and dimension lumber were not surveyed, measured or marked by a surveyor or other person in this state, or by any person having any authority or appointment under the laws of this state.

Section 15 of the city charter of the city of Lawrence provides that the city council may make by-laws with suitable penalties for the inspection, survey, measurement and sale of lumber, wood, coal and bark, brought into the city for sale. The city council of the city of Lawrence has never made any by-laws under said section of its charter, nor any by-law, regulation or ordinance what-

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ever for the inspection, survey, sale or measurement of lumber, but said city council has annually, for several years, in the manner and form provided by the city charter and by-laws for the election of officers generally, duly elected officers designated as surveyors of lumber in the city of Lawrence, who, after being sworn by the city clerk to faithfully and impartially discharge their duties as surveyors of lumber in the city of Lawrence, have acted as practical surveyors of boards and other lumber in said city when called upon so to do, and at the time of the sale of said boards and dimension lumber by the plaintiffs to the defendants there were such duly elected and sworn officers in the city of Lawrence.

If the above facts are a bar to the plaintiffs' claim, then at the date of the writ there was nothing due the plaintiffs from the defendants. If said facts are not a bar, there was due the plaintiffs from the defendants, at the date of the writ, the sum of $1577.48.

W. S. Knox, for the plaintiffs.

E. T. Burley, for the defendants.

ENDICOTT, J. Towns are required at their annual meetings to choose one or more surveyors of lumber. Gen. Sts. *c.* 18, § 31. The provisions of this section apply to cities, so far as they are not inconsistent with the general or special provisions relating to cities; and the city council of a city has the power of a town, subject to this restriction. Gen. Sts. *c.* 19, § 2. By the Gen. Sts. *c.* 49, § 131, cities, except those mentioned in § 126, "may from time to time establish" ordinances with suitable penalties respecting the appointment of surveyors of lumber. And the city charter of Lawrence, St. 1853, *c.* 70, § 15, also provides that the city of Lawrence may establish such ordinances.

It appears from the record that the city of Lawrence has never passed any ordinance on this subject, but that it has annually elected surveyors of lumber, who have acted in that capacity, and that, at the time of the sale in question, there were in Lawrence such officers duly elected and sworn.

The lumber for which the plaintiffs seek to recover in this action was not surveyed, marked or numbered as required by the provisions of the Gen. Sts. *c.* 49, §§ 132–144; but the plaintiffs contend, that, as the city of Lawrence had passed no ordinances

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on the subject, the sale does not come within the provisions of that chapter.

But this position is not tenable. It was evidently the object of the Legislature to establish, by general law, uniform regulations respecting the sale of lumber, and to impose upon all cities and towns the duty of electing surveyors. The provision that cities may pass ordinances on the subject with suitable penalties is not compulsory; and if a city fails to pass such an ordinance, it still has the duty of electing surveyors, and the provisions of the Gen. Sts. *c.* 49, apply to sales of lumber within its limits.

Any one who sells lumber brought into the state for sale, and which is not surveyed, marked and numbered as required by the statute, is subject to the penalty imposed in § 143. This penalty implies a prohibition to sell except as provided in the statute, and the plaintiffs cannot recover the price of the lumber sold in violation of these provisions. *Miller* v. *Post*, 1 Allen, 434. *Libby* v. *Downey*, 5 Allen, 299. *Sawyer* v. *Smith*, 109 Mass. 220.

The St. of 1875, *c.* 153, has no reference to sales of lumber, but to sales of goods, wares and merchandise by weights and measures; if it had, as contended by the plaintiffs, it can only apply to sales made after its passage.

Judgment for defendants.

CHARLES P. BRIGHAM *vs.* TRUE W. TOWNSEND.

Suffolk. June 24, 1875. — January 4, 1876.

A party to a contract, who agrees for a specified price to convey a good and clear title to a parcel of land, free from all incumbrances, except a mortgage of three and three fourth cents per square foot, cannot maintain an action at law upon the contract for the refusal of the other party, who has agreed to buy the land on these terms, to complete the purchase, if it appears that the land is subject to a mortgage of four and one quarter cents per square foot, although he tenders with the deed the difference in money between the incumbrance mentioned in the agreement and that existing.

CONTRACT upon an instrument under seal, dated October 24, 1872, and signed by the parties, whereby the plaintiff agreed to

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sell and the defendant to purchase five lots of land, for a price named, the land to be conveyed "on or before December 1, 1872, by a good and sufficient warranty deed, conveying a good and clear title to the same, free of all incumbrances, except a mortgage of three and three fourth cents per square foot on each of said lots, No. 27, 28 and 29," and certain specified incumbrances on the other lots.

At the trial in the Superior Court, before *Pitman*, J., the defendant testified that he gave the plaintiff notice that he should not carry out the trade before the time when it should have been consummated; but the plaintiff testified that the defendant never gave him any notice that he should not carry out the trade, and that he had no notice to that effect from the defendant; that he went to the defendant's place of business three times on Saturday, November 30, with deeds properly executed, and with money to tender the same to the defendant, and to request him to fulfil his contract, but did not find him in, and did not seek him elsewhere; that on Monday, December 2, he went to defendant's place of business, and found him in, and then tendered him the deeds and money; that the defendant refused to accept the same, and then told him, for the first time, that he should not carry out the trade, alleging false representations on the part of the plaintiff as the reason therefor.

The plaintiff admitted that there was a mortgage on lots 27, 28 and 29 amounting to four and one quarter cents per square foot, but testified that he took with him, and tendered to the defendant the difference between three and three fourth cents and four and a quarter in cash.

The defendant asked the judge to instruct the jury as follows: "1. That the plaintiff should have tendered the deeds on Saturday, November 30, December 1 being on Sunday, and he was bound to seek the defendant at his place of residence and make his tender there, and that it was too late for him to make his tender on Monday, December 2.

"2. That it was incumbent upon the plaintiff to establish his case, and to do so he was bound to prove that the premises were free from all incumbrances except those mentioned in the agreement, and that, as the incumbrance exceeded three and three fourth cents per foot on lots 27, 28 and 29, at the time he made

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the tender therefor, he did not comply with the terms of the agreement, and cannot recover in this action."

The judge refused so to rule, but instructed the jury that if the plaintiff went to the defendant's place of business on Saturday, November 30, in business hours, and was prepared to tender his deed, and the defendant was not in, he was not obliged to seek him elsewhere, and that a tender on Monday, December 2, was a good tender. Also, that, if the plaintiff tendered the defendant the deeds and the difference between three and three fourth cents and four and a quarter cents per square foot in cash, it was a substantial performance of the contract and he would be entitled to recover.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions to these rulings.

C. H. Chellis, for the defendant.

L. W. Howes & F. W. Kittredge, for the plaintiff.

AMES, J. The objection that the tender of the deed by the plaintiff was not seasonably made cannot be sustained, and was not relied upon at the argument. But the discrepancy between the actual amount of the incumbrance upon a portion of the land which the plaintiff was to convey and its amount as described in the contract raises a more serious question.

A portion of the land which the plaintiff was to convey subject to a mortgage of three cents and three quarters of a cent per foot proves to be subject in fact to a mortgage of four and one quarter cents per foot. It does not appear that the mortgage has become due, so that by paying the excess it would be in the power of the plaintiff literally to fulfil his contract, and give the exact title which he had bound himself to give. In a suit at common law, and in a case of mutual and dependent stipulations, where the plaintiff is himself unable to fully carry out the contract on his own part, he cannot compel the defendant to accept an equivalent. The defendant is entitled to have what he contracted for. A purchaser will not be compelled to take a doubtful title, or one subject to incumbrances more onerous than those stated in the contract. The equivalent which the plaintiff offers is the payment of a sum of money into the defendant's hands, under circumstances which might impose upon him the duty of holding it in trust, to be applied upon the mortgage at its maturity. But how-

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ever that may be, the law will not compel him to accept such payment as a substitute for the original contract; and it is for him, and not for the court, to decide whether the proposed indemnity is satisfactory. *Exceptions sustained.*

Eliza D. Mayo *vs.* Uriah K. Mayo.
Same *vs.* Same.

Suffolk. November 19, 1875. — January 4, 1876. Colt, J., absent.

On the trial of a libel by a wife for divorce from her husband on the ground of cruelty, the husband was permitted, without objection, to show in explanation of his conduct that he had received an anonymous letter, but was not permitted to put the contents of the letter in evidence. *Held*, that he had no ground of exception.

On the trial of a libel by a wife for divorce from her husband on the ground of adultery, the libellant contended that the husband had committed adultery with A., and put in evidence tending to show that he and A. were found together in the same room at a hotel in the night-time, under circumstances which justified the inference of adulterous intercourse. The husband contended and put in evidence, tending to show that he was at the hotel in his professional capacity as a dentist, and that the libellant, A. and a private detective, had formed a criminal conspiracy to entice him to the hotel and place him in an equivocal position with A. so as to furnish false evidence of adultery. The husband called A. and asked her if she was the woman spoken of as being in the hotel with him. She declined to answer on the ground that it would tend to criminate herself, and the judge instructed her that she was not obliged to do so. He then asked her a number of questions which she answered without objection, and which, so far as relevant, would furnish links in a chain of evidence tending to convict her either of adultery or criminal conspiracy. She then declined to answer further. The judge then instructed her as to her rights more fully than at first, and inquired of her if she had fully understood them. She replied that she had not. *Held*, that it was within the discretion of the presiding judge to allow the witness then to claim her privilege, and to order her evidence already given to be struck out of the case.

If the testimony of a witness is struck out of the case, on the ground of her misapprehension of her privilege as a witness, the party calling her cannot put in her declarations or admissions to contradict her, under the St. of 1869, *c.* 425.

On the trial of a libel by a wife for divorce from her husband on the ground of adultery, the woman with whom the husband was charged with having had adulterous intercourse was called by the libellee as a witness, testified, and her testimony was afterwards stricken out on the ground of her misapprehension of her privilege as a witness. She was then asked by the libellee, "Whom she had met and with whom she had been in conversation since the adjournment of the court" several days before. The judge ruled that the libellee might show any conversations with the libellant or any agent of hers, but beyond this the question was

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immaterial. *Held*, there being no testimony of the witness in the case to be contradicted by such conversations, that the ruling was correct.

On the trial of a libel by a wife for divorce from her husband on the ground of adultery, the woman with whom the husband was charged with having had adulterous intercourse was called by the libellee as a witness, testified, and her testimony was afterwards stricken out because of her misapprehension of her privilege as a witness. The libellee argued to the jury, without any adverse ruling being made, that he had done all he could to get the woman as a witness and to make her testify as to the facts. The judge in his charge stated that the case must be considered as if the woman had never been put upon the stand. *Held*, that this expression in the charge gave the libellee no ground of exception.

MORTON, J. The libellant brought two libels for divorce, one charging extreme cruelty, the other adultery, which were tried together.

The only exception in the case for cruelty was to the exclusion by the court of the anonymous letter offered by the libellee. The fact that he had received an anonymous letter was put in by him, without objection, in explanation of his conduct. The letter was not evidence of the facts stated in it, and, whatever were its contents, could not justify abusive treatment of his wife. It was rightly rejected.

The other exceptions apply only to the libel for adultery.

The libellant claimed that her husband had committed adultery with one Mrs. French, and put in evidence tending to show that he and Mrs. French were found together in the same room at a hotel, in the night-time, under circumstances which justified the inference of adulterous intercourse.

The libellee claimed, and put in evidence tending to show, that he was at the hotel in his professional capacity as a dentist, and that the libellant, Mrs. French and a private detective, had formed a criminal conspiracy to entice him to the hotel and place him in an equivocal position with Mrs. French, so as to furnish false evidence of adultery.

The libellee called Mrs. French as a witness. He asked her if she was the woman spoken of as being at the hotel with him. She declined to answer, on the ground that it would tend to criminate herself, and the court instructed her that she was not obliged to do so. He then asked her a number of questions, which she answered without objection. Those answers, so far as they were of any materiality or relevancy in the case, would furnish links in a chain of evidence which would tend to convict her

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either of adultery or of a criminal conspiracy. She then declined to answer further. The court then instructed her as to her rights more fully than at first, and inquired of her if she had fully understood them. She replied that she had not, and the court, being satisfied "that she had not fully comprehended her rights, and especially that she had not understood that if she answered upon any subject having any tendency to criminate herself, she must answer fully and minutely both on examination and cross-examination in relation thereto, ruled that she might then claim her privilege, and that the evidence heretofore given by her, having been given under this misapprehension, should be struck out of the case," to which the libellee excepted. We are of opinion that this course of proceeding of the presiding justice was not open to exception.

It is within the discretion of the court, and the usual practice, to advise a witness that he is not bound to criminate himself, where it appears necessary to protect the rights of the witness. If, after having advised him generally, it appears to the presiding justice that the witness intends to insist upon his privilege, but does not fully understand his rights, it is competent for him to instruct the witness fully as to them, otherwise the witness might be entrapped into a position where his privilege as a witness would be entirely defeated through his ignorance, and he would be obliged fully to criminate himself. *Foster* v. *Pierce*, 11 Cush. 437. *Commonwealth* v. *Price*, 10 Gray, 472.

In the case at bar, therefore, it was competent for the presiding justice, after the witness had made some answers tending to criminate her, if he was satisfied that she had answered ignorantly and in misapprehension of her rights and duty to the court, to instruct her more fully and to advise her that she was not obliged to answer further. And it necessarily followed that such answers already given should be stricken out. The libellant could have no right to cross-examine the witness in regard to them, and the only way to preserve the rights of all parties was to strike them from the case, as inadvertently and improperly admitted.

As the answers thus excluded embraced all the testimony of Mrs. French which had any bearing upon the case, the court properly directed that her whole testimony should be considered

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as out of the case. This being so, it is too clear to need any discussion, that the libellee could not put in her declarations or admissions, to contradict her, under the St. of 1869, *c.* 425.

The trial consumed several days, and at a late stage of it the libellee asked the witness, Mrs. French, "whom she had met and with whom she had been in company since the adjournment of the court on the Saturday previous." The court ruled that the libellee might show any conversations with the libellant or any agent of hers, but beyond this the question was immaterial. This was correct. Any conversations the witness had held were incompetent, unless they were with the libellant or some one connected with her, there being no testimony of the witness in the case to be contradicted by such conversations.

The libellant excepted to an expresssion used in the charge to the jury to the effect, that the case must be considered as if Mrs. French had never been put upon the stand, claiming that he had a right to have the jury consider that he had done all he could to get her as a witness and to make her testify as to the facts. But the instruction fairly construed did not deprive him of this right.

It appears by the bill of exceptions that he was permitted to and did argue this claim to the jury, and that no adverse ruling was made in regard to it. The instruction is in substance the same as if the court had said that the case was to be considered as if Mrs. French had not given any evidence. It was not intended to, and did not in fact, deprive the libellant of the right to argue that he had done all he could to procure her testimony.

Exceptions overruled

A. A. Ranney, for the libellee.

G. A. Somerby, for the libellant

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PATRICK CARR *vs.* EDWARD DOOLEY.

Middlesex. Jan. 13, 1875. — Jan. 4, 1876. AMES & ENDICOTT, JJ., absent.

Under the Gen. Sts. *c.* 48, § 5, providing that assessments for sewers and drains shall constitute a lien on the real estate assessed "for one year after they are laid," an assessment by the mayor and aldermen of a city of the expenses of laying a sewer in a street of the city upon land abutting thereon and benefited thereby, is an incumbrance thereon from the time of the order for its construction, and is a breach of the covenant against incumbrances in a deed of the premises delivered after such order, but before the assessment was laid.

At the time of negotiations for the purchase of land, a sewer was in process of construction in the street on which the land abutted; the party proposing to purchase called the owner's attention to the sewer, and asked him who was to pay for the sewer, to which the owner replied that he would, and that the other party should not be called upon to pay a cent for it. A deed of the land was subsequently given, with the usual warranty against incumbrances, but no mention was made in it of the sewer. The purchaser afterwards paid an assessment upon the land for the construction of the sewer. *Held*, in an action by him against his grantor upon a special promise to pay any assessment which should be laid on account of the sewer, in which the consideration was averred to be the purchase of the land, that evidence of the conversation and of the existing circumstances was sufficient to prove the promise. *Held, also*, that the evidence was competent, and was not open to the objection that it varied or enlarged the written instrument; and that the promise proved was not within the statute of frauds.

COLT, J. The first count in the plaintiff's declaration is upon the covenant against incumbrances contained in the defendant's deed to him. It alleges that the plaintiff has been obliged to pay an assessment for a sewer, which was a lien on the estate when the deed was made. The deed is dated June 8, 1870. The sewer was constructed under the provisions of the St. of 1869, *c.* 111, in pursuance of a resolution of the mayor and aldermen passed in May previous, directing "that a common sewer be laid in Cedar Street, from the Crosby Street sewer to Keene Street; the size of the sewer to be twelve inches in diameter." No question was made at the argument that this was not a sufficient location, and we must so regard it. *Bennett* v. *New Bedford*, 110 Mass. 433. The assessment was not made until after the deed was delivered.

It is objected that the liability to an assessment when the deed was made was not an incumbrance upon the land within the meaning of the covenant, because, by the terms of the Gen. Sts

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c. 18, § 5, assessments are only made a lien on the real estate "for one year after they are laid."

Upon this question, the construction to be given to the statute must be such as accords with the interpretation given by this court to similar provisions relating to the collection of taxes. By the Gen. Sts. c. 12, § 22, taxes assessed on real estate are declared to be a lien thereon for two years after they are committed to the collector; and yet, in *Cochran* v. *Guild*, 106 Mass. 29, in answer to the objection that they were not an incumbrance until so committed, it was held that they were so from the first of May, the date of their assessment, because the land then became liable for their payment.

In *Jones* v. *Aldermen of Boston*, 104 Mass. 461, where the question was, whether the St. of 1868, c. 276, which repealed § 5 of the St. of 1866, c. 174, with a clause saving all rights and liabilities which had accrued under it, affected an existing liability to be assessed in proceedings for widening a street commenced before the repeal, but under which no assessment had then been laid, it was declared that the right of the landowner to damages, and his liability to assessment for benefit, accrued at the time of the widening, although the assessment of damages and the adjudication of the amount of benefit must of necessity be made afterwards. The act under which the proceedings for widening the street in that case were had provided that all assessments should constitute a lien on real estate, to be enforced in the manner provided for the collection of taxes; thus adopting the provision of the Gen. Sts. c. 12, which makes them a lien on the estate for two years after they are committed to the assessor. See also *Prince* v. *Boston*, 111 Mass. 226.

In *Blackie* v. *Hudson*, 117 Mass. 181, it was held, under the Sts. of 1866, c. 174, and 1868, c. 276, that the liability to an assessment of the expenses of widening a street was an incumbrance thereon from the time of the order of widening, and a breach of the covenant in a deed which was delivered before the assessment was made, but after the order for widening was passed.

The construction thus given to the betterment acts applies with equal force to the statutes which authorize sewer assessments. In both cases the elements necessary to ascertain the

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amount of the assessment must be ascertained after the work is done; and both are instances of local taxation for local improvements in which the estates immediately benefited are required to bear a proportional share of part at least of the whole cost of doing the work. The incumbrance, though not ascertained in amount until the assessment is made, is none the less an incumbrance, and attaches to the real estate benefited when a liability to assessment for the specific work ordered by the proper authorities first arises.

The first count in the declaration may, therefore, be maintained on the ground that at the time of the delivery of the deed, an incumbrance had been created on the land for a share of the expense of the Cedar Street sewer, under the order of the mayor and aldermen of the city of Lowell.

The second count is upon an alleged special promise to pay any assessments which should be made on account of the sewer then being built. The consideration of this promise is averred to have been the purchase of the land. In proof of the promise, the plaintiff relied on a conversation had between the parties during negotiations for the purchase and while the sewer was in open process of construction in front of the premises. The plaintiff called the defendant's attention to the sewer, and asked, "Who is to pay for this sewer?" The defendant replied, "I will pay all that. You shall not be called upon to pay a cent for it." It is objected that this evidence, is not sufficient to prove the promise; but the language of the defendant, interpreted with reference to the subject matter and the existing condition of the work, is enough to justify the jury in finding a verdict for the plaintiff.

Upon the question of its competency, it is sufficient that it has a tendency to prove an independent agreement made with reference to a distinct and separate matter, and founded upon a consideration embraced in the price of the land. The language relied on was indeed part of a conversation which took place while negotiations were pending which ended in a deed with limited covenants of warranty and against incumbrances, but it is not open to the objection that it is here used to vary or enlarge in any respect the contents of a written instrument, or that the

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promise proved is within the statute of frauds. *Preble* v. *Baldwin*, 6 Cush. 549. *Howe* v. *Walker*, 4 Gray, 318.

Case to stand for trial on both counts.

C. R. Blaisdell, for the plaintiff.

D. S. Richardson, (*G. F. Richardson* with him,) for the defendant.

COMMONWEALTH *vs.* OWEN FILBURN & others.

Worcester. Oct. 5, 1875. — Jan. 4, 1876. AMES, J., absent.

An indictment on the Gen. Sts. c. 163, § 12, alleging the arrest for drunkenness of A., at a time and place mentioned, by B., a constable of the town, and that the defendant "did then and there unlawfully aid and assist the said A. in then and there unlawfully escaping from the said lawful custody of the said B.," is insufficient, although it follows the words of the statute.

INDICTMENT on the Gen. Sts. *c.* 163, § 12, alleging that "Patrick Gibbons of Clinton, in said county, on the thirteenth day of September, in the year eighteen hundred and seventy-four, at Clinton, in said county, was guilty of the crime of drunkenness, in a public street in said Clinton, by the voluntary use of intoxicating liquor, and that the said Patrick Gibbons, at the time and place said offence was committed, in manner and form aforesaid, to wit: on the said thirteenth day of September, in the year aforesaid, at Clinton aforesaid, in a public street as aforesaid, was lawfully arrested for said offence by one Edward J. Plunket, he being then and there a constable of said Clinton, duly chosen, appointed and qualified to discharge and perform the duties of that office, and also being then and there in the due and lawful execution of the same, and also being then and there in the peace of said Commonwealth, and that Owen Filburn, Thomas O'Maley, Walter Burke and Philip Filburn, all of said Clinton, did then and there unlawfully aid and assist the said Patrick Gibbons in then and there unlawfully escaping from the said lawful custody of said Edward J. Plunket."

In the Superior Court, before the jury were empanelled, the defendants filed a motion to quash the indictment on the following grounds:

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"There is not set forth in said indictment any offence known to the law of this Commonwealth. There is not any offence plainly, formally and substantially described in said indictment. It is not alleged in said indictment that the defendant Gibbons was taken into the custody of Plunket.

"It is not alleged that the defendant Gibbons escaped from the custody of Plunket. It is not alleged that the defendants applied any force or made any threat or did any other thing to compel said Plunket to release said Gibbons. It is nowhere alleged in said indictment that the defendants knew that the said Gibbons was arrested by the said Plunket, that they knew that said Plunket was a constable, or that he was in the lawful discharge of his said office. All the allegations of said indictment may be true, and yet no offence have been committed, and the said indictment is otherwise defective, informal and insufficient."

Bacon, J., overruled the motion. The defendants were tried and found guilty, and after verdict filed a motion in arrest of judgment, assigning substantially the same reasons as in their motion to quash. This motion was also overruled; and the defendants alleged exceptions.

M. J. McCafferty, for the defendants.

C. R. Train, Attorney General, for the Commonwealth.

MORTON, J. The defendants are indicted under the Gen. Sts. c. 163, § 12, which provides a punishment for any person who "aids or assists a prisoner in escaping, or attempting to escape, from an officer or person who has the lawful custody of such prisoner." It is clear that it was not the purpose of this statute merely to prescribe a punishment for a common law offence. The intent of the Legislature was to define and describe the offence intended to be punished.

But we are of opinion that it is not within that class of statutes as to which it has been held that an indictment is sufficient which follows the words of the statute.

Construing it in the light of well known principles of the criminal law, there is no difficulty in ascertaining the intention of the Legislature. But the language used does not, *ex vi termini*, describe all the ingredients of the offence intended to be punished with the certainty required in criminal pleading. An indictment under it, therefore, must allege all the facts necessary to bring

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the case within the intent and meaning of the statute. *Commonwealth* v. *Barrett*, 108 Mass. 302, and cases cited.

By the literal construction of the statute, any person who should do any act, however innocent, the effect of which was to aid a prisoner in escaping, would be subject to its penalty. For instance, if a prisoner should escape, and a person driving in the street should innocently give him a ride, or if a person should innocently receive him in his house, and thus enable him to elude the fresh pursuit of the officer, such persons would, within the literal terms of the statute, aid the prisoner in escaping. But it cannot be presumed that the Legislature intended to subject such persons to its penalty, and thus punish them for innocent acts done without any criminal intent.

In such a case, if the act was done without any knowledge that the person aided was an escaping prisoner, it would be innocent and not punishable, but if done with such knowledge would be criminal and within the statute. The indictment should allege the acts done by the defendants. If they are unlawful in their nature, such as an assault upon or forcible obstruction of the officer, it may not be necessary to allege knowledge of the defendants that the prisoner was in custody. But if they are in their nature innocent, and are only made criminal by a knowledge that the prisoner was escaping, such knowledge should be alleged. Otherwise, the indictment fails to allege or show any unlawful act or criminal intent, and does not state a case within the spirit of the statute.

Tested by these rules, the indictment in the case at bar is insufficient. It alleges that Patrick Gibbons was lawfully arrested by Edward J. Plunket, a constable, for the crime of drunkenness, on September 13, 1874, and that the defendants "did then and there unlawfully aid and assist the said Patrick Gibbons in then and there unlawfully escaping from the said lawful custody of said Edward J. Plunket." It does not allege what acts were done by the defendants, nor that they knew that Gibbons was in custody, and therefore does not allege any unlawful act or criminal intent which brings the case within the statute.

It is doubtful whether it alleges with sufficient clearness that Gibbons was in the custody of the officer when the acts were committed, but it is not necessary to consider this objection.

Exceptions sustained.

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COMMONWEALTH *vs.* DAVID B. TIFFANY.

Worcester. October 5, 1875. — January 4, 1876. AMES, J., absent.

A complaint under the St. of 1869, c. 384, § 19, which charges the defendant with fishing in a certain pond, "in which fishes are lawfully artificially cultivated or maintained, without the permission of B., the proprietor of the pond," is sufficient without further designating the nature of B.'s interest.

Under the St. of 1869, c. 384, § 9, authorizing the commissioners of inland fisheries to lease, in the name of the Commonwealth, any great pond, exceeding twenty acres in area, for the purpose of cultivating useful fishes, the commissioners have authority to lease a pond which exceeds twenty acres in extent in its natural condition, although it has been increased beyond that extent by a dam.

The provision of the St. of 1869, c. 384, § 7, that the proprietors of any pond or parts of a pond, created by artificial flowage, shall have exclusive control of the fisheries therein existing, does not deprive the commissioners of their authority, under § 9 of the statute, to lease any pond exceeding twenty acres in area in its natural condition, although the pond has been increased in extent by artificial flowage.

ENDICOTT, J. This is a complaint under the St. of 1869, c. 384, § 19, and it contains the charge that the defendant "in that portion of a certain pond, commonly known as Pratt's Pond, in which fishes are lawfully artificially cultivated and maintained, did unlawfully fish, without the permission of Daniel W. Batchelor, the proprietor of said pond." The defendant moved before the magistrate and in the Superior Court before the jury were empanelled, to quash the complaint, because it did not allege that Batchelor was the proprietor of the pond, or that the pond had been leased to any person by the commissioners of inland fisheries, which motion was overruled and the defendant excepted.

It appears by the report that Pratt's Pond was leased to Batchelor, under § 9, by the commissioners of inland fisheries. The lease was in proper form and duly delivered; the lessee had entered under it and complied with its provisions, and the defendant had fished in the pond as charged in the complaint. It was in evidence that the pond was at the date of the lease about forty acres in extent; and that its waters were in part restrained by an artificial dam, and were used for operating a mill. The owner of the privilege had the right to maintain the dam and raise the water, as appeared by certain deeds which were put into the case. Upon this evidence the defendant contended that the pond could not be leased by the commissioners. But the

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court ruled that if the jury found that the pond was more than twenty acres in extent before the erection of the dam, it could be leased by the commissioners. The defendant excepted to this ruling, and the jury found the defendant guilty.

Two questions are thus presented and have been argued by the defendant: first, whether the complaint should allege more specifically that Batchelor was the proprietor and the nature of his interest; and, secondly, whether the pond in question could be leased by the commissioners under § 9.

1. It is contended by the defendant, that there are three classes of proprietors who are entitled to the control of the fishery in ponds under §§ 7 and 9; namely, the riparian proprietors of any pond not more than twenty acres in extent; the proprietors of any pond or parts of a pond created by artificial flowage; and the lessee of any great pond, exceeding twenty acres in extent, under a lease from the commissioners for the purpose of cultivating useful fishes therein. And the defendant further contends that if any one fishes in any pond held by either class of proprietors, he is subject to the penalty provided in § 19.

It is provided in § 18, "that fishes artificially propagated or maintained shall be the absolute property of the person propagating or maintaining them;" and § 19 provides that "whoever fishes in that portion of a pond, ... in which fishes are lawfully artificially cultivated or maintained, without the permission of the proprietors," shall incur certain penalties.

It has been decided that a pond leased by the commissioners under § 9, for the cultivation of useful fishes, and thereby set apart and held for that purpose, is a place where "fishes are lawfully artificially cultivated and maintained" within the meaning of § 19; and that the lessee of such pond has the exclusive right of fishing in the whole pond. *Commonwealth* v. *Vincent*, 108 Mass. 441, 451. *Commonwealth* v. *Weatherhead*, 110 Mass. 175. The question has not been raised or decided, whether the penalties imposed in § 19 can be enforced against persons fishing without the permission of the riparian proprietors of ponds not more than twenty acres in extent, or of artificial ponds mentioned in § 7; or what proof, if any, is required on the part of such proprietors, that fishes are lawfully artificially cultivated therein. In the view taken by us, it is not now neces-

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sary to decide that question; for assuming for the purposes of this case, as contended by the defendant, that every person is subject to the penalties named in § 19, who fishes in ponds not more than twenty acres in extent, or ponds created artificially, without having obtained the permission of the proprietors, who artificially cultivate or maintain fishes therein, we are of opinion that this complaint is not defective.

By referring to the words of the complaint, and to § 19, it appears that the complaint follows the language of the statute in describing the offence. It comes within the rule as stated by Mr. Justice Metcalf, in *Commonwealth* v. *Welsh*, 7 Gray, 324, that a charge in an indictment may be made in the words of a statute, without a particular statement of facts and circumstances, when, by using those words, the act in which an offence consists is fully, directly and expressly alleged, without any uncertainty or ambiguity. See *Commonwealth* v. *Barrett*, 108 Mass. 302. The offence here consists in fishing in a pond, called Pratt's Pond, in which fishes are lawfully artificially cultivated or maintained, without the permission of Batchelor, the proprietor of the pond.

It is immaterial and unimportant, so far as the defendant is concerned, or as bearing on the offence charged, how Batchelor obtained or held his title, or to which class of proprietors named in §§ 7 and 9 he belonged. That is a matter of evidence, involved in the proof which the government must offer to show that the pond was devoted to the artificial cultivation of fishes, and a particular statement of that fact need not be made in the complaint. Whether he was the riparian proprietor of a pond not more than twenty acres in extent, or the owner of an artificial pond, or a lessee under the commissioners, in either case, it was the same offence and subject to the same penalties. The lease was competent evidence to prove that the pond was set apart for the purpose named in the complaint, and that Batchelor was the proprietor, without whose permission the act complained of was done. Assuming therefore the construction contended for by the defendant to be the true construction, it is unnecessary to allege more particularly the proprietorship of Batchelor, or that he held the pond under a lease from the commissioners.

2. The remaining question to be considered is, whether the commissioners had authority to lease Pratt's Pond under the pro-

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visions of § 9, or in other words, is Pratt's Pond a great pond within the meaning of that section. The verdict of the jury involved the decision, that before the erection of the dam it was more than twenty acres in extent, and the case finds that its area had been largely increased by the erection of the dam, and the consequent flowing back of the water. It is to be observed that the St. of 1869, *c.* 384, changes the law in regard to the size of great ponds, in which the public may have the right of fishing. By the ordinance of 1647, Anc. Chart. 148, 149, "no town shall appropriate to any particular person or persons any great pond containing more than ten acres of land." The uniform construction of this ordinance has been, that the right of fishing was public in all ponds exceeding ten acres of land, unless appropriated by the Legislature or the towns acting under the authority of the Legislature. *Commonwealth* v. *Vincent*, 108 Mass. 441, 451. *Coolidge* v. *Williams*, 4 Mass. 140. *West Roxbury* v. *Stoddard*, 7 Allen, 158, 166. The St. of 1869, *c.* 384, § 7, gives to the riparian proprietors of any pond, not more than twenty acres in extent, the exclusive control of the fisheries therein existing; and § 8 declares that any pond exceeding twenty acres in extent shall be public, except such as may have been granted by law, or leased as provided in § 9. As the law now stands the public have no right of fishing in any pond not more than twenty acres in extent.

But the term "great pond," as used in the Body of Liberties, Art. 16; 28 Mass. Hist. Soc. Coll. 219; in the colony ordinance of 1647; Anc. Chart. 148, 149; and in St. 1869, means a pond of a certain area created by the natural formation of the land at a particular place. The verdict establishes the fact that Pratt's Pond is a natural pond of this kind, and being in its natural state more than twenty acres in extent, it is within the description of a great pond in § 9. It was not created by the dam, but by the natural formation of the land; and the fact that it has been increased by the dam, does not change its character as a great pond of more than twenty acres in extent.

But the defendant contends that even if this construction is correct the commissioners have no authority to lease this pond, because it comes within the description of § 7, where it is provided that "the proprietors of any pond or parts of a pond,

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created by artificial flowage, shall have exclusive control of the fisheries therein." This class of ponds the commissioners have no authority to lease, and the defendant contends, that, as parts of Pratt's Pond were created by artificial flowage, the proprietors who own that part of the land so flooded have control of the fisheries therein, and so upon a strict construction of the statute the commissioners could not lease the exclusive right to the fisheries in the whole pond.

But this is not the true construction of that clause of § 7. The words do not bear the interpretation "any pond or parts of a pond," which pond or parts are created by artificial flowage; but "any pond or parts of a pond," which pond is created by artificial flowage. The word created refers to pond in each portion of the sentence. The provision has reference only to artificial ponds, artificially created, which may be owned in whole or in part by certain proprietors. What may be the extent of the rights of any proprietor of a part of such artificial pond, it is not necessary here to consider.

This gives a plain practical construction to the statute; and it was the evident intention of the Legislature in enacting it, that the riparian proprietors of ponds not more than twenty acres in extent, and the proprietors of ponds created by artificial flowage, shall have exclusive control of the fisheries therein existing; and that in great ponds which in their natural condition exceed twenty acres in extent, but which may have been increased by artificial flowage, the owners of land, covered by such increased or artificial flowage, have no control of the fisheries existing in such pond by reason of the provisions in § 7. Such ponds are public, as provided in § 8, unless specially granted by law or leased and, if leased, the lessee has the exclusive right to the fishery therein during the continuance of his lease.

Exceptions overruled.

J. Hopkins, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

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COMMONWEALTH *vs.* ELLEN L. SMITH.

Bristol. October 26, 1875. — January 4, 1876. MORTON, J., absent.

At the trial of an indictment for burning a dwelling house there was evidence tending to show that the house was set on fire by some one, and there were facts and circumstances pointing to the defendant, a girl fourteen years old, as the probable incendiary. The government was permitted to introduce evidence that after her arrest, and while in custody, the defendant confessed to officers, when questioned by them, that she set the fire, and stated how she did it, but it did not appear that any threats or promises were made by the officers. The jury were instructed that they should give no weight to the confession if it was induced by threats or promises; but if it was not so induced, that such weight should be given to it as they thought it entitled to; that threats and inducements might be by acts as well as words; and that mere fear on the part of the defendant did not render the confession incompetent unless induced by some improper conduct on the part of the officers. *Held*, that the evidence was rightly admitted. *Held*, also, that the instructions were correct. *Held*, also, that the confession, being supported by independent evidence, would warrant a conviction.

INDICTMENT for burning the dwelling house of Giles F. Allen, at Dartmouth, on June 28, 1874. At the trial in the Superior Court, before *Pitman*, J., there was evidence tending to show the following facts:

On the night of June 28, 1874, said Allen and his wife went to bed at about nine o'clock. The rest of the family, consisting of a young son of twelve, his sister-in-law, and two small children, and also his hired man, Head, and the defendant, a colored servant girl, between fourteen and fifteen years of age, employed for her food and clothing, had all previously retired to bed between eight and nine o'clock. Mr. and Mrs. Allen slept on the first floor of the house in a bedroom leading from the dining room, and the rest above. At about quarter past ten o'clock, Mrs. Allen was awakened by the smell of smoke. She aroused her husband who was asleep, went to the cellar door, opened it, and discovered a blaze in the basement. Her husband hurried down, and found that some shingles, which had been placed in a partitioned room adjoining a washroom, were on fire; he extinguished the fire with a few buckets of water standing near, which had been drawn by himself and hired man the night before. Mrs. Allen aroused the family, and when Head got down there the fire was extinguished, only some portions of the door and casements of the building

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being slightly burned. The outside cellar door that led out doors from the washroom could be unbarred from the outside, by a person acquainted, by the removal of a stone between the mason work and the door frame. It had been fastened that night, but was then unbarred, so that it could be opened, the bar being dropped down on the floor at the bottom. It could not be opened and closed without a creaking noise by rubbing on the threshold. The sister-in-law and the children slept in the second story over the first floor, and Head and the defendant slept in the second story of the ell, her room being beyond his, and she usually passed through his room on going to or from her room. Upon the alarm being given she passed through his room in her night clothes before he had got out of bed, and at the request of Mrs. Allen, lighted some lamps, and then went with Mr. Allen's son to call in some neighbors. The family soon after retired.

The next morning, Mrs. Allen discovered a half-pint bottle about half full of kerosene, standing at the end of a wood box in the kitchen. She testified that it was not there the night before and she had never seen the bottle before, and that, though she had used a half-pint bottle to pour kerosene on her hens frequently, this was not the one she used. She showed it to her sister and husband, and to the defendant that morning, and inquired if they knew how it came there, and they all answered in the negative. They kept kerosene in a two gallon can, and another smaller can kept on a shelf under the sink in the kitchen. They used kerosene for light. That morning Mr. Allen discovered a considerable amount of kerosene on the shingles beneath where the fire occurred, which had not burned. He showed these shingles and the bottle of kerosene to officers Dayton and Dunham, of New Bedford, who came there on July 7, following. Mr. Allen had previously offered a reward of $200 for the detection of the incendiary. Dayton and Dunham caused the kerosene found in the bottle and also that kept in the cans in the house to be tested by an inspector or assayer who pronounced them the same in quality.

On July 10, the defendant, at about four o'clock in the morning, before the family was up, left Mr. Allen's, without his knowledge, and walked to New Bedford, a distance of about eleven miles, and to the house of G. W. Offley, a friend of her parents,

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and whom she had before frequently visited. Mr. Allen called there for her during the forenoon, and had some conversation about her return and her clothing that she had left, she telling him that she did not wish to return. She afterwards testified that the reason of her leaving as she did was that she was afraid they would not let her go, and that she wanted to live in the city and wanted wages.

In the forenoon of July 14, she remaining at Offley's, Dayton, a police officer of New Bedford, and Dunham, a state constable, called at Offley's house, not having a warrant, and found the defendant shelling peas. Dayton said to her, "Ellen, I want you." She got up, went up stairs followed by Dayton, got her bonnet, and came down. Mrs. Offley was then there and inquired what was up. Dayton replied, "We want her to go down town." Mrs. Offley then said, "Tell the whole truth." They went with her in a carriage to the police station of New Bedford, a distance of about a mile and a half, and as she was going into a cell under the charge of Dunham, and had just got inside when Dayton said to Dunham, "Hold up, let us talk here." They then sat down near the cell door, and Dayton asked her why she left Allen's, and she said she was tired and wanted to live in the city. Dayton then said, "Ellen, I suspect you of setting the fire," and asked her if she did. The defendant objected to evidence of what she said at that time in the nature of a confession, on the ground that what she said was under intimidation in the nature of threats or promises, though there was no evidence of verbal threats or promises. The judge overruled the objection, and the evidence was admitted. Dayton and Dunham then testified, substantially, that in answer to their questions while sitting there, and no other person present, she said that on Sunday afternoon, (the day of the fire,) when filling the lamps, she went down cellar where there were bottles, took a bottle from there, filled it with kerosene from the can, and set it on the shelf in the kitchen, and at night, when she thought they were all asleep, she came out through Head's room, down stairs, took the bottle, and went through the dining room into the front entry and down the cellar stairs leading from there, and she poured some of the kerosene on the shingles, put a match to them, then took the bar from the outside cellar door, and laid it so it would look as if some one from outside had un-

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fastened it; that she did not open the door, as it would creak on the bottom; that she then came up stairs, and as she passed through the kitchen she set the bottle, being about half full, at the end of the wood box, where Mrs. Allen found it the next morning, and then passed up stairs to her own room, and had just got into bed when she heard Mrs. Allen give the alarm, and she came down, as has been stated. She was then shown the bottle by Dunham, and said she knew that it was the bottle by the dirt that was in the bottom. She was asked if she knew them (Dayton and Dunham) when they were at Allen's on July 7. She replied that she did, and if they had then asked her she would have told them the same; that she was sorry as soon as she did it.

She was then put into the cell, and shortly afterwards, within a few minutes, one Hammond, an officer, saw her in the cell crying, and asked her what she was in there for, and she replied, "For setting a fire."

Mrs. Allen testified that her bedroom adjoined the dining room, that her door that led into it was open, but the doors that led into the kitchen and front entry through which Ellen passed were both closed when she arose, and the cellar door leading from the front entry which was also fastened.

The defendant testified that the officers promised her that, if she would say she set the fire, they would clear her, and she would not be prosecuted, and that thereupon she told them she did set it on fire, but that she told none of the particulars in regard to the kerosene and manner of doing it, as detailed by them; that her confession was untrue; that she had nothing to do with setting the building on fire; that she told the story to effect her release from jail; that she pleaded not guilty to the complaint the next morning, and had been persistent in her denial of the charge ever since.

Both officers being recalled denied using the language attributed to them by the defendant, or any threats or promises. This was all the material evidence in the case. The defendant then asked that the evidence of the confession be excluded as improperly obtained. This was refused. The defendant then requested the judge to instruct the jury as follows:

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"1. That if they were satisfied that the confession was made under fear or under menace, though not of words, they should reject it.

"2. That a naked confession uncorroborated by circumstances is not sufficient to justify a conviction; that proof that the arson was committed by some one is not in itself standing alone a corroboration of the confession.

"3. That the whole evidence as it stood would not justify a conviction."

The judge declined to give these instructions, and upon these points instructed the jury as follows:

"1. If upon the whole evidence in the case it appears to you that the alleged confessions were not induced by any threats or promises, they may be considered by you and allowed such weight as you consider them entitled to; but if these statements appear to you to have been induced by threats or promises, the statements should not be allowed any weight or effect against the defendant.

"2. Threats and inducements may be by acts or conduct as well as by words. But mere fear on the part of the prisoner, unless induced by some improper conduct on the part of the officers, would not render the confession incompetent. So the fact that the confession was made while the party was under arrest, or in a cell, or after the prisoner had been placed therein and then taken out, would not of itself render the confession inadmissible.

"3. A free and voluntary confession by a person accused of an offence, whether made before or after the arrest, if satisfactorily proved, and there is independent evidence that the crime has been committed by some one, is sufficient according to the common law to warrant the jury in convicting if it leads their minds to that result, without any other corroboration."

The jury returned a verdict of guilty; and the defendant alleged exceptions to the several rulings and refusals to rule.

J. Brown, for the defendant. 1. The second and third instructions were objectionable. The judge should have given instead thereof the instructions requested, or, the instructions given on this point should have been better guarded to protect the rights of the defendant. While it is the province of the court to decide

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whether a confession is admissible in the first instance, and, in the absence of threats and promises, confessions are generally admissible, yet the jury have the right to judge as a matter of fact under proper instructions whether a confession is voluntary. If in their judgment it is not voluntary, there is no good reason why they should not have the right to reject it as well as the court, if a threat however slight had been made to induce the confession. In *Commonwealth* v. *Cuffee*, 108 Mass. 285, the court instructed the jury, in regard to the statements subsequent to the original confession, that if the first statement of the defendant was obtained by improper influence, statements made to the same officers afterwards were presumed to be; but whether subsequent statements to other officers were made under the same influence was a question for the jury, and, if they were, they should not be allowed any weight or effect against the defendant. Thus the court held that the question of improper influence was for the jury, though the statement or confession of the defendant was properly admitted as evidence for their consideration.

2. But, if this point is not tenable, injustice was done to the defendant by the instructions as given, without further explanation and caution. The ruling requested had no reference to the competency or admissibility of the evidence, for it was already in; and as the second instruction was intended to be responsive to the request, and no caution or explanation was given as to the effect mere fear would have upon its weight, the jury might fairly infer that they were bound to give it some weight at all events, however reprehensible they might deem the conduct of the officers, in arresting her without a warrant, and not furnishing a scintilla of evidence against her except the confession, and however they might deem the situation of the child, with no friend near, and in prison, might paralyze her mind, and drive her to desperate expedients to obtain her liberty. *Commonwealth* v. *Cullen*, 111 Mass. 435. *Commonwealth* v. *Putnam*, 2 Allen, 391.

3. There was no evidence that would warrant suspicion, much more arrest, before the confession. Her story was therefore uncorroborated in any material point. While courts have held that proof of the *corpus delicti* is sufficient corroboration to warrant conviction, the fact that the defendant admitted the existence of no facts, outside of her own acts, that were not known to every

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member of the family, as well as the officers, should at least have entitled her to an instruction that such a confession, procured as it was, should be received with great circumspection if not distrust.

C. R. Train, Attorney General, for the Commonwealth, was not called upon.

ENDICOTT, J. There was evidence that the dwelling house had been set on fire by some one, and there were facts and circumstances pointing to the defendant as the probable incendiary. After her arrest and while in custody, she confessed that she set the fire, and stated how she did it. This evidence was objected to, but as it did not appear that any threats or promises were made on the part of the officers, it was properly admitted; and the fact, that the defendant was but fourteen years of age, and under arrest, and made the confession to officers, does not render it incompetent. *Commonwealth* v. *Cuffee*, 108 Mass. 285. The defendant then testified that she made the statement under the promise that she should not be prosecuted, and to obtain her release, and that the statement was untrue.

The jury were instructed, that they should give no weight to the confession if it was induced by threats or promises, but if not so induced that such weight should be given to it as they thought it entitled to; and that threats and inducements might be by acts as well as words. To this instruction the presiding judge added that mere fear on the part of the defendant did not render the confession incompetent unless induced by some improper conduct on the part of the officers.

This instruction is not open to the objections urged by the defendant. To avoid the effect of this confession the hope or fear, which led the defendant to confess facts unfavorable to her, must be induced by the threats, promises or conduct of the officers to whom she made the confession. *Commonwealth* v. *Morey*, 1 Gray, 461. *Commonwealth* v. *Taylor*, 5 Cush. 605. *State* v. *Grant*, 22 Maine, 171. *Rex* v. *Row*, Russ. & Ry. 153. There was no evidence of promises or other inducements held out by other officers, or other persons, whom she might presume had authority in the premises. *Commonwealth* v. *Cullen*, 111 Mass. 435. Fear arising from other causes, and not induced by threats or promises, would not render the confession incompetent, or necessarily affect its weight with the jury. See 2 Lead. Crim. Cas. (2d ed.) 570, 577.

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Upon the facts presented in this case, and there being independent evidence that the crime had been committed, a free and voluntary confession by the party accused would warrant a conviction. *Commonwealth* v. *Howe*, 9 Gray, 110. *Rex* v. *Eldridge*, Russ. & Ry. 440. *Exceptions overruled.*

COMMONWEALTH *vs.* LAWRENCE TOLLIVER & another.

Bristol. November 22, 1875. — January 4, 1876. COLT, J., absent.

On the trial of an indictment for robbery, it appeared that the defendant was not arrested until the end of the third day after the robbery, and the evidence was conflicting whether he had been concealing himself during the whole or any part of that time. To show such concealment the government called as a witness a policeman, who assisted in the arrest, and asked him, How soon after the robbery did you commence looking for the defendant? *Held*, that the question was rightly permitted to be answered.

On the trial of an indictment for robbery, the government offered to prove certain confessions by the defendant, which the judge excluded as having been obtained by promises and threats made to him by officers. The defendant afterwards took the stand and testified in his own behalf, and upon cross-examination was asked by the government what statements he had made in the interview in which the confessions were made. The judge ruled that having made himself a witness, the inquiry could be made whether he made statements inconsistent with his testimony on the stand, as affecting his credit. *Held*, that the instruction was sufficiently favorable to the defendant.

On the trial of an indictment for robbery, the government introduced evidence that the defendant had concealed himself to avoid arrest. The defendant offered evidence tending to show that instead of concealing himself, he was publicly walking about the streets before his arrest. The government then offered to show that while walking about the streets for an hour or two previous to the arrest, the defendant had assumed a disguised gait and manner. The defendant had introduced no evidence upon this point, and the judge ruled that such testimony could be properly given, although no testimony had been given by him or question asked of him in relation to any disguise adopted by him. *Held*, that it was within the discretion of the presiding judge to admit the evidence, and that the ruling was correct.

On the trial of an indictment for robbery, the person robbed testified that she was robbed of a ten dollar bill, a five dollar bill, and three two dollar bills, but she was unable to say whether they were bank bills or not. When the defendant was arrested three days after the robbery, he was found to have in his possession two five dollar bank bills, and two two dollar bills, one of which was a bank bill, and the other not. The person robbed had testified that in the struggle with the robbers she bit the finger of one of them so as to cause a wound, and when arrested there was a wound upon the corresponding finger of the defendant's hand. There was a stain on one of the two dollar bills which the government contended was a blood stain.

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but there was no evidence that it was such except what appeared on inspection, and there was no evidence of the identity of the money other than this. The person robbed could not identify the money found upon the defendant as hers, or any of it, and there was no other evidence as to what she was robbed of. *Held*, that the question was rightly submitted to the jury whether any of the bills found on the defendant were taken from the person robbed.

INDICTMENT charging Lawrence Tolliver and Cornelius Randall with the robbery, on September 1, 1875, from the person of Catherine Byron, of "three bank bills, each of the denomination of five dollars and each of the value of five dollars; three bank bills each of the denomination of two dollars, and each of the value of two dollars, and one bank bill of the denomination of ten dollars, and of the value of ten dollars, of the goods and moneys of said Catherine Byron."

At the trial in the Superior Court, before *Wilkinson*, J., the evidence of the government tended to show that Catherine Byron, the person named in the indictment, went to ride with the defendant Randall, at his invitation, on the evening of September 1, 1875; that while so riding with him in the suburbs of the city, she was attacked by two persons, beaten and bruised, and robbed of a sum of money; and it was claimed by the government, and there was some evidence tending to show, that one of the attacking party was the defendant, Tolliver, and that Randall was consenting to the same in consequence of some previous understanding. Tolliver was not arrested until the end of the third day after the robbery, and the evidence was conflicting as to whether he had been concealing himself and avoiding the whole or any part of that time; and to show that he had so concealed himself, the district attorney called as a witness one of the policemen of New Bedford, who assisted in his arrest, and asked him, "How soon after the robbery did you commence looking for Tolliver?" The defendant, Tolliver, objected to the inquiry as inadmissible for the purpose for which it was put; but the judge allowed the question to be put to the witness.

Samuel Brown was called by the government to testify to certain statements in the nature of confessions, and also implicating Tolliver, made to him, Brown, by Randall, while lying in jail awaiting trial; but upon examination it was found as a fact by the judge that whatever was said by Randall upon that occasion

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was said by him while unduly and improperly influenced by promises or threats made to him by officers and others, and upon that finding excluded the testimony proposed to be offered. Randall afterwards took the stand and testified in his own behalf; and upon cross-examination was inquired of by the district attorney in relation to the statements made by him to Brown, and was asked by the district attorney what statements he had made to Brown in the interview in the jail before referred to. The defendants objected to the inquiry proposed, but the judge ruled that having made himself a witness, the inquiry could be made whether he had made statements inconsistent with his testimony on the stand as affecting his credit.

Evidence was offered by the government in chief, tending to show that during a portion of the time between the robbery and his arrest, Tolliver was in concealment to avoid arrest. Tolliver then testified in his own behalf, and stated with particularity his whereabouts during the whole of said time; and particularly (in answer to questions by the district attorney) for a short time before his arrest. The district attorney then called a witness in rebuttal, who testified without objection to his whereabouts just previous to his arrest, contradicting to a certain extent the testimony of Tolliver upon the same point. The district attorney then offered to show by this same witness that while walking about the streets for an hour or two before his arrest, Tolliver had assumed a disguised gait and manner. No evidence had been given by the defence upon this point, and Tolliver objected to the same, on the ground that it was not admissible at that stage of the case, not being in rebuttal; but the judge ruled that such testimony could be properly given although no testimony had been given by him or question asked of him in relation to any disguise adopted by him, and admitted the evidence.

Catherine Byron testified that in the struggle with the robbers she bit the finger of one of them so as to cause a wound; and when Tolliver was arrested there was a wound upon the corresponding finger of his hand. She also testified that she was robbed of a ten dollar bill, a five dollar bill, and three two dollar bills; but whether they were bank bills or not she was wholly unable to say. When Tolliver was arrested three days afterwards, he was found to have in his possession, two five dollar

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bank bills, and two two dollar bills, one of which was a bank bill and the other not. There was a stain on one of the two dollar bills which the district attorney claimed was a stain of blood, but there was no evidence that it was such except what appeared on inspection, and there was no evidence of the identity of the money other than this; and Catherine Byron could not identify the money found upon Tolliver as hers, or any of it, and there was no other evidence as to what she was robbed of. Upon this evidence the defendants asked the judge to rule that there was no evidence of the robbery of any bank bills, as charged in the indictment; but the judge ruled that the evidence upon this point was sufficient to go to a jury.

The jury found each defendant guilty; and the defendants alleged exceptions to the rulings and refusals to rule.

H. M. Knowlton, for the defendants.

W. C. Loring, (*C. R. Train*, Attorney General, with him,) for the Commonwealth.

AMES, J. As one circumstance having a tendency to prove guilt on the part of the defendant, Tolliver, the fact that he concealed himself immediately after the alleged robbery was admissible. This fact could only be proved by evidence that he was sought for and not readily or easily found. Such evidence would be of little weight unless it were nearly connected with the time of the robbery, and therefore, among other particulars in regard to the attempt made to find him, it was necessary and proper to inquire how soon after the robbery the search for him began.

By availing himself of the right to take the stand as a witness, the defendant became a general witness in the case, subject to the same tests of truthfulness, and the same rules as to examination and cross-examination as are applicable to all other witnesses. Being sworn to tell the truth, the whole truth, and nothing but the truth, he waived all right to keep anything back, even in the case of questions, the answers to which would tend to criminate himself. *Commonwealth* v. *Lannan*, 13 Allen, 563. *Commonwealth* v. *Mullen*, 97 Mass. 545. *Commonwealth* v. *Bonner*, 97 Mass. 587. *Commonwealth* v. *Nichols*, 114 Mass. 285. Among the modes of impeachment, he, like any other witness may be cross-examined as to a conflicting account of the matter given by him on some other occasion. Such an inquiry may be

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gone into, not for the purpose of proving the truth of the former account, but as an impeachment of his credit as a witness. *Day* v. *Stickney*, 14 Allen, 255. He would still be at liberty to testify that his alleged confession was not true, and to offer such explanation as to the inducements and circumstances under which he gave it as he may see fit. *Commonwealth* v. *Howe*, 9 Gray, 110. The limitations to which the course of inquiry upon this point was subjected by the court gave to the defendant all the protection to which he was entitled.

The defendant, Tolliver, having offered evidence tending to show that instead of concealing himself, he was publicly walking about the streets before his arrest, it was wholly within the discretion of the presiding judge to allow evidence, on behalf of the prosecution and by way of rebuttal, to the effect that while so in the streets he was under an attempted disguise. The ruling upon that point is not open to exception.

The evidence of the person who had been robbed was not relied upon as sufficient, taken by itself, to identify with entire certainty the bills which had been taken from her. The partial correspondence between some of the bills which she had lost and those found upon Tolliver, three days after the robbery, was evidence competent to be considered by the jury, especially when taken in connection with the stain upon one of the bills which, it was argued, was occasioned by blood from the wound upon the finger of one of the robbers, as described in the bill of exceptions. Some of the bills found upon his person answered to the description contained in the indictment, and we cannot say upon this report that there was no evidence tending to identify one or more of them. Its weight and effect were for the jury to consider.

Exceptions overruled.

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COMMONWEALTH *vs.* JOHN BUTLAND.

Suffolk. November 22, 1875. — January 3, 1876. COLT, J., absent.

An indictment against B. for perjury, alleged that on March 25, 1875, at Boston, in the county of Suffolk and Commonwealth of Massachusetts, C. "was brought before the Municipal Court of the city of Boston, holden at said Boston for the transaction of criminal business, upon a complaint in due form of law," charging him with perjury; that the further consideration of said complaint was continued until the sixth day of April next ensuing; and that on said sixth day of April, said C. "being lawfully before said Municipal Court, it was lawfully ordered by said Municipal Court" that C. recognize with sureties, and that he be committed until he should so recognize, and that on the ninth day of said April, at Boston aforesaid, before one A., a commissioner within and for said county of Suffolk, legally authorized, and duly appointed and qualified to take bail in criminal cases in said county, B. offered himself as bail and surety in such recognizance for said C.; that B. was then and there lawfully required by said commissioner — pursuant to the course and practice of taking and approving bail — to make a written statement under oath of his, said B.'s, circumstances and property, the same being material to aid said commissioner in determining whether he would and should take and approve said B. as his bail and surety; that said B., being then and there duly sworn to the requirement aforesaid, did then and there, in pursuance of said requirement, make said statement, and did then and there, being so sworn as aforesaid, falsely, wilfully, knowingly and corruptly say, depose and swear (in and by said written statement) as follows. The indictment then set forth the statement signed by B., and entitled "Commonwealth of Massachusetts. Suffolk, ss. Before A., a commissioner duly authorized to take bail in criminal cases in said county." *Held*, that, if it was necessary under the St. of 1860, *c.* 186, § 1, to allege that the court had jurisdiction of the case of B., the fact was sufficiently alleged. *Held, also*, that the indictment duly alleged before whom the oath was administered to B. with sufficient allegations of the time and place thereof.

A commissioner to take bail in criminal cases may require a written statement under oath from the bail, although the case does not come within the provisions of the St. of 1862, *c.* 159.

On an indictment for perjury for swearing falsely when being examined under oath as bail for a person, who had been arrested on a complaint to a Municipal Court for an assault and battery upon a police officer, it appeared that the person arrested was ordered to recognize to appear before the Superior Court, and that he entered into a recognizance "to answer to said complaint for the crime aforesaid." *Held*, that the recognizance was valid, and bound the principal to appear before the Superior Court to answer to any indictment which might be substituted for the complaint.

The statements under oath, of a person offering himself as bail, as to the value of his property, are material, and if they are wilfully and corruptly false, he is liable to conviction for perjury.

An indictment for perjury averred that the defendant stated under oath that certain land was of the cash value of not less than five thousand dollars, whereas it was of trifling value, to wit, ten dollars in all. At the trial there was some evidence

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that the land was of the value of eighteen hundred dollars. The defendant asked the judge to rule that the variance between the allegation and proof was fatal. The judge declined so to rule, and instructed the jury that it was not necessary for the government to prove that the true value of the property did not exceed ten dollars, but it must prove that its value was not what was stated by the defendant, and that he, knowing its value was less than stated by him, intentionally misstated its value. *Held*, that the defendant had no ground of exception.

On the trial of an indictment for perjury, the issue being whether the defendant had knowingly falsely sworn that he had land in a certain town worth $5000, the evidence on the part of the government was the testimony of one witness who put the value at $1800, and the deed of the land to the defendant, made six months before, which stated the consideration to be $2800; and there were other issues to be submitted to the jury involving the question whether the defendant had sworn falsely. *Held*, that the testimony of the witness was supported by corroborating circumstances sufficient to justify the submission of the issue to the jury.

On the trial of an indictment for perjury, the issue being whether the defendant had knowingly falsely sworn that he had personal property to the amount of $1285, consisting of stock in a grocery store in a certain town, two witnesses testified that he had no such store in the town. Two other witnesses testified that the defendant made admissions to them to the same effect. *Held*, that the issue was rightly submitted to the jury.

On the trial of an indictment for perjury, the issue being whether the defendant had knowingly falsely sworn on December 11, 1874, that his liabilities did not exceed $500, and that he was worth not less than $20,000 over and above all liabilities, there was evidence that the defendant went into bankruptcy in 1872, and that his schedules under oath showed debts to the amount of $85,000; that he had not received a discharge, and no dividend had been paid. *Held*, that this evidence, unexplained and uncontrolled by evidence that the defendant had since paid the debts or acquired property, was properly submitted to the jury.

An indictment alleging that the defendant committed perjury in an examination touching the amount of his property, upon his offer to be bail for one who had been committed to jail on a criminal charge, by falsely swearing that he had personal property at Gloucester, in the county of Essex and Commonwealth of Massachusetts, is supported by proof that he swore to a written statement that he had personal property at Gloucester, in the county of Essex, there being proof of facts to show that the statement could apply, and was intended to apply to Gloucester, in the county of Essex and Commonwealth of Massachusetts, and that he had no property there.

On an indictment for perjury, the issue being whether the defendant had falsely sworn that he owned land in a certain town of the value of $5000, it appearing that the deed to him of the land was signed by A. and his wife in her right, A. was permitted to testify, against the defendant's objection, that the defendant paid nothing to him for the land. *Held*, that the evidence was admissible.

INDICTMENT for perjury in two counts. The first count alleged that on March 25, 1875, at Boston, in the county of Suffolk and Commonwealth of Massachusetts, "one Lovell K. Currier was brought before the Municipal Court of the city of Boston, holden at said Boston for the transaction of criminal business

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upon a complaint in due form of law, charging him, said Currier, with the crime of perjury, committed at said Boston; that the further consideration of said complaint was continued until the sixth day of April then next ensuing; and that on said sixth day of April, said Currier being lawfully before said Municipal Court upon said complaint, it was lawfully ordered by said Municipal Court that the further consideration of said complaint be continued until the fourteenth day of said April, and that said Currier recognize with sufficient sureties in the sum of twelve hundred dollars for the personal appearance of him, said Currier, before the said Municipal Court, on the said fourteenth day of April, then and there to answer further to said complaint, and to do and receive that which should then be enjoined upon him, said Currier, by said Municipal Court, and not depart without license; and that said Currier should stand committed to the jail, at Boston, in said county, until he should recognize as aforesaid; and that upon said sixth day of April said Currier failed to recognize as aforesaid, and was committed to said jail in pursuance of said order; and that thereafter, to wit, on the ninth day of said April, and while said Currier was committed and held in jail as aforesaid, at Boston aforesaid, before one Edward J. Jones, Esquire, a commissioner within and for said county of Suffolk, legally authorized, and duly appointed and qualified to take bail in criminal cases in said county, John Butland, of said Boston, offered himself as bail and surety in such recognizance for said Currier; that said Butland was then and there lawfully required by said commissioner — pursuant to the course and practice of taking and approving bail — to make a written statement under oath of his, said Butland's, circumstances and property, the same being material to aid said commissioner in determining whether he would and should take and approve said Butland as such bail and surety; that said Butland, being then and there duly sworn to the requirement aforesaid, did then and there, in pursuance of said requirement, make said statement, and did then and there, being so sworn as aforesaid, falsely, wilfully, knowingly and corruptly say, depose and swear (in and by said written statement) as follows, that is to say: Commonwealth of Massachusetts. Suffolk, ss. Before Edward J. Jones, Esquire, a commissioner duly authorized to take bail in criminal cases in said county, I (mean-

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ing said Butland) offering myself as surety in the matter of said Commonwealth *vs.* Lovell K. Currier, on oath certify and declare."

The first count then set forth the written statement at length, negatived the declarations thereof, and concluded as follows:

"And so the jurors aforesaid, on their oath aforesaid, do present and say, that said John Butland, on said ninth day of April, before said Edward J. Jones, Esquire, then and there having such power and authority as aforesaid, in manner and form aforesaid, did knowingly and wilfully commit wicked and wilful perjury, against the peace of said Commonwealth, and the form of the statute in such case made and provided."

The second count was for perjury on the examination of the defendant as bail for one John White, who, as the indictment alleged, was lawfully brought before the Municipal Court of the South Boston District, for the transaction of criminal business, upon a complaint charging him with the crime of assault and battery upon a police officer, and was ordered to recognize with sureties for his appearance before the Superior Court, "to answer to said complaint for the crime aforesaid;" and for the failure so to do was committed to jail; and while so committed made application to a commissioner to be admitted to bail. The indictment then alleged that the defendant offered himself as bail, and on his examination before the commissioner, swore to a written statement, which was set forth at length in the indictment, and the allegations thereof negatived, and concluded in the usual manner.

At the trial in the Superior Court, before the jury were empanelled, the defendant filed a motion to quash the indictment, assigning reasons therefor. This motion was overruled. The defendant was then tried and found guilty, and alleged exceptions, the substance of which, together with so much of the material parts of the indictment as are not already stated, and of the motion to quash, appears in the opinion.

H. R. Cheney, for the defendant.

W. C. Loring, (*C. R. Train*, Attorney General, with him,) for the Commonwealth.

MORTON, J. The motion to quash the indictment was rightly overruled. The statute provides that in every indictment for

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perjury, it shall be sufficient to set forth the substance of the offence charged upon the defendant in the criminal case in which the perjury is alleged to have been committed, and by what court or before whom the oath was taken or made, without setting forth the indictment or any part of any proceedings, and without setting forth the commission or authority of the court or person before whom the offence of perjury was committed. St. 1860, *c.* 186, § 1.

The principal reason for quashing this indictment, urged by the defendant, though stated in different forms, is in substance, that it does not sufficiently allege that the Municipal Court had jurisdiction of the case of Currier, in which the perjury was alleged to have been committed. It may be doubted whether such an allegation is necessary. Currier, having been committed for not finding sureties to recognize for him, had a right to be released on bail, whether the court had jurisdiction or not, and it might be perjury if the defendant swore falsely on the proceedings to procure his discharge.

But if such an allegation is necessary, we are of opinion that it is sufficiently made in this indictment. The first count alleges that Currier was lawfully before the court upon a complaint charging him with perjury, and that it was lawfully ordered that he recognize with sureties and be committed until he so recognize, which could not be true if the court had no jurisdiction of the case. This is sufficient within the spirit of the statute, the design of which was to avoid the necessity of setting forth in full the complaint or other proceedings of the court or magistrate before whom the case was pending. *Commonwealth* v. *Hatfield*, 107 Mass. 227. *Commonwealth* v. *Carel*, 105 Mass. 582. *Commonwealth* v. *Hughes*, 5 Allen, 499.

The objection that the count contains "no allegation by or before whom the oath was administered to the defendant," and no sufficient allegation of time and place, is unfounded. It alleges with certainty, so as not to be open to any other construction, that the defendant, at Boston, on the ninth day of April, 1875, made the written statement and took the oath alleged, before Edward J. Jones, a duly authorized and qualified commissioner.

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The objection that the commissioner had no authority to require or take the written statement under oath, is founded upon a misconstruction of the St. of 1862, *c.* 159. The design of that statute was to provide especial safeguards in the matter of admitting to bail persons who had been convicted in the Superior Court in the county of Suffolk, and, for that purpose, to require that the court or commissioner should, in such cases, take a written certificate under oath of the sureties; but it does not deprive the commissioner of the power which he had, independently of the statute, to take a written statement in other cases where persons offer themselves as bail. It does not affect the case at bar.

The same considerations dispose of most of the objections to the second count. The only ground of objection specially applicable to that count, upon which the defendant relies, is that the recognizance of White was not in due form. The indictment, after reciting that said White was lawfully before the Municipal Court upon a complaint charging him with assault and battery upon a police officer, alleges that he was ordered to recognize to appear before the Superior Court "to answer to said complaint, for the crime aforesaid." The defendant contends that, as he would not be tried on this complaint in the Superior Court, he should have been ordered to recognize to answer to any indictment which might be found against him for the offence charged. The case of *Commonwealth* v. *Slocum*, 14 Gray, 395, is decisive of this point. It was there held that a recognizance in this form was valid and sufficient, and bound the defendant to appear at the Superior Court and answer to any indictment which was substituted for the complaint.

We now proceed to consider the several exceptions alleged by the defendant in the course of the trial.

1. The defendant in his written statement swore that he owned real estate in Lynn of the cash value of not less than five thousand dollars, and also that he was worth in good property not less than four thousand dollars over and above all debts and liabilities.

The indictment alleges, in the second and twelfth assignments of perjury, that the real estate in Lynn was of trifling value, to wit, ten dollars, and that the defendant was not worth in good property four thousand dollars, nor any sum whatever over and above his liabilities.

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In regard to these two assignments, the defendant contended and asked the court to rule, that his statements as to the value of his land or his property were not material, and that he could not be convicted if such statements were false. The court instructed the jury that "if the defendant stated under oath the value of his property to be much more than it really was, but made the statement in good faith, or ignorantly, it being his opinion as to its value, he would not be liable on account of his wrong statement; but if he, knowing its value was less than stated by him, intentionally misstated its value, in order that he might be accepted as bail, he would be liable to conviction for perjury if the other allegations are proved." This instruction was accurate and carefully guarded.

The issue before the commissioner was the sufficiency of the defendant as bail. The matter to be determined was whether he was worth enough to justify his approval as a surety. His statements as to the value of his property were material to this issue, and if they were wilfully and corruptly false, he would be liable to conviction for perjury.

2. The defendant asked the court to rule that there was a variance between the allegation and the proof in the second assignment. The allegation in the assignment is, that the real estate in Lynn was "of trifling value, to wit, ten dollars and no more," and there was some evidence tending to show that it was worth eighteen hundred dollars.

The court, upon this request, properly ruled that it was not necessary for the government to prove that the true value of the property did not exceed ten dollars, but it must prove "that its value was not what was stated by the defendant, and that he, knowing its value was less than stated by him, intentionally misstated its value."

The issue was whether the defendant wilfully swore falsely in his statement that the land was of the cash value of not less than five thousand dollars. The allegation is only material as an averment, that the land was not worth the amount stated, and it is substantially satisfied by proof that the land was of materially less value than that amount.

3. The defendant requested the court to rule that the evidence of the falsity of the defendant's oath as to the value and amount

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of his property and the amount of his debts, was not sufficient to justify a verdict of guilty upon these assignments, but the court declined so to rule.

It is not necessary that there should be two living witnesses in contradiction of the statement of the defendant to justify a conviction of perjury. It is sufficient if, in addition to one directly opposing witness, corroborating circumstances sufficient to turn the scale and overcome the oath of the defendant and the legal presumption of his innocence are proved. *Commonwealth* v. *Parker*, 2 Cush. 212. And where the defendant's statement is contradicted by a witness, who is supported by corroborating circumstances, the evidence must ordinarily be submitted, under proper instructions, to the jury, whose province it is to judge of the weight of such corroborating circumstances.

In the case at bar the defendant's statement that the land in Lynn was worth five thousand dollars, was directly contradicted by the witness Bunelly, and there were circumstances proved which tended to support Bunelly, and to contradict the defendant. The deed to the defendant states the consideration to be twenty-eight hundred dollars, which, if unexplained, affords some presumption that that was the price paid for it. The deed also shows that the quantity of the land was about twelve thousand square feet; the defendant, in his statement, says that he does not know on what street it was situated; the suspicious character of the statement, and the improbability that the owner would not know the street on which land of so great a value per square foot was situated, were circumstances tending to prove the defendant's falsity. Further, if the defendant wilfully swore falsely as to other matters in the written statement, upon which the jury were to judge upon the evidence, this would tend to overcome his oath as to the particulars we are considering. We are of opinion that the court rightly submitted this question to the jury.

The same considerations dispose of the request to rule, that there was not sufficient evidence that the defendant did not own a grocery store and stock of goods in Gloucester. Upon this question there was the testimony of two witnesses that he had no such store, and in addition the admissions of the defendant to the same effect made to two other witnesses. The evidence was rightly submitted to the jury.

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The court also rightly submitted to the jury the question, whether the defendant swore falsely as to the amount of his debts and property. The defendant swore on December 11, 1874, that his debts did not exceed five hundred dollars, and that he was worth twenty thousand dollars over and above all debts and liabilities. The proceedings in bankruptcy showed that in 1872 the defendant, in his schedules, admitted under oath that he was indebted in a very large amount, namely, eighty-five thousand dollars, and that there had been no dividend or discharge. These facts, unexplained and uncontrolled by any evidence that the defendant had since then paid the debts or acquired any property, were proper for the consideration of the jury.

This disposes also of the request to rule, that the evidence was not sufficient to support the assignments in the second count, which charge that the defendant swore falsely as to the amount of his debts and property.

4. The defendant also contended that there was a variance between the allegation and the proof as to the store and property in Gloucester. The government's evidence tended to show that the defendant had no store or property in Gloucester, in the State of Massachusetts. The statement of the defendant upon this point was proved to be, "that I have personal estate in Gloucester, in the county of Essex; grocery store, cash value is not less than $1285, consisting of stock in grocery store."

The ground which the defendant takes is, that there is no affirmation or assertion in his statement that he owned personal property or a grocery store in the State of Massachusetts, and he relies upon the case of *Commonwealth* v. *Hughes*, 5 Allen, 499.

In that case the court say, "Whether any facts might have been proved, in the light of which the written statement of the defendant would have been interpreted so as to apply only to lands and houses in Massachusetts, need not now be considered, for no such facts were proved." In the case at bar such facts were proved. There was sufficient evidence to justify the jury in finding that the defendant's statement could apply, and was intended to apply only to Gloucester, in the State of Massachusetts. We are of opinion that this question was properly left to the jury, with the instruction stated in the bill of exceptions,

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namely, "If the other evidence in the case satisfies you that the defendant meant in his statement Gloucester, in the county of Essex and State of Massachusetts, you may then consider his written statement as applying to that town of Gloucester."

5. The only other exception insisted on by the defendant is that to the admission of the testimony of Bunelly, that the defendant paid him nothing for the land in Lynn. The deed was made by Bunelly and his wife, in her right, to the defendant. The fact that the defendant paid Bunelly nothing may be of little weight, but it was admissible as a part of the transaction.

We have considered all the exceptions of the defendant which he has relied upon in the hearing before us, and the result is that he has shown no reason for disturbing the verdict of the jury.

Exceptions overruled.

JAMES CRIMM *vs.* COMMONWEALTH.

Suffolk. November 27, 1875. — January 4, 1876. COLT, J., absent.

A grand jury in this Commonwealth may consist of not less than thirteen, nor more than twenty-three.

Under the Gen. Sts. c. 171, § 4, providing for the case of deficiency of grand jurors in any court, the court is authorized whenever the number of grand jurors in attendance is less than the full number of twenty-three, to cause so many additional grand jurors to be summoned as in its opinion, making due allowance for absences and excuses, may insure the filling up of the grand jury to that number; and the summoning of a greater number does not affect the valjdity of an indictment found by the legal number of jurors.

If grand jurors, after being sworn, are at once excused and never join the grand jury in their deliberations, they form no part of the grand jury by which an indictment is found.

If on a writ of error to the Superior Court a record is sent to this court, which is afterwards amended on a writ of certiorari, the validity of the proceedings is to be determined by the amended record.

On a writ of error to the Superior Court, it appeared by the record sent to this court, as amended on a writ of certiorari, that of the twenty-three grand jurors summoned, five were permanently excused; that a venire was thereupon ordered by the court to issue for seven additional grand jurors, six of whom appeared and were sworn, and two of them permanently excused, leaving a grand jury of twenty-two; that these with the seventh additional juror before summoned constituted the grand jury by which an indictment was found. *Held*, that the grand jury was properly constituted.

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WRIT OF ERROR to reverse a judgment rendered for the Commonwealth, upon an indictment for burglary, at February term 1875 of the Superior Court for the county of Suffolk, for the transaction of criminal business. The assignment of errors was as follows:

"First. That after twenty-three persons had been summoned as grand jurors upon venires issued for that number, according to the statute in such cases provided, and a legal grand jury had been constituted therefrom according to law, and after twenty of said grand jurors, being first duly sworn, had retired to commence their investigations, and before the finding of said indictment against Crimm, the court ordered a second venire to issue for seven other persons, four of whom came into court and were sworn as grand jurors, and allowed to retire with and take part in the investigation of said grand jury as members thereof, said second venire being illegal, and said persons returned under the same being illegally sworn, as there was no deficiency in said grand jury at the time it issued or at any other time, and said persons returned under the same were not required; and said illegal grand jury, constituted as aforesaid, was not a grand jury, and said indictment found by the same is void.

"Second. That after venires had issued for twenty-three persons, and said twenty-three persons had been drawn and summoned according to law, and twenty of them sworn as grand jurors, four other persons were illegally sworn as grand jurors and served as such; and by the reason of such swearing and serving of said four persons on said grand jury, the doings of said grand jury were and are illegal and void.

"Third. That by the serving upon said grand jury of said four additional persons, the number of persons serving was made to consist of an illegal and too large a number; to wit, twenty-four persons.

"Fourth. That said four persons, admitted to serve as aforesaid, were illegally admitted to serve, and this said service upon said grand jury rendered all the acts of said grand jury illegal and void.

"Fifth. That while no deficiency of grand jurors existed, and after twenty-three grand jurors had been summoned according to law, a new venire issued for and seven more persons were sum-

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moned and brought into court to act as grand jurors, causing said grand jury to consist of thirty persons.

"Sixth. That after said twenty-four persons had been sworn and permitted to serve upon said pretended grand jury, and before the finding of the indictment against this plaintiff, an additional person was illegally sworn and permitted to serve on said grand jury."

The record, as first brought before this court, was as set forth below, excepting the words printed in brackets, and including those in italics. The attorney general, after oyer prayed of the record remitted, suggested "a diminution of the record in said Superior Court, touching the proceedings relating to the empanelling of the grand jurors for the body of the county of Suffolk, in said court, and in regard to their being sworn according to law;" and therefore moved that a writ of certiorari might issue to the chief justice of that court, directing him to send up the whole of the proceedings remaining of record therein touching the premises, that this court might advise thereon. The motion was granted, and in obedience to the writ of certiorari a record was returned, differing from the first by the insertion of the words printed in brackets, and the omission of those printed in italics.

"Commonwealth of Massachusetts, Suffolk, to wit: At the Superior Court, begun and holden at the city of Boston, within and for the county of Suffolk, for the transaction of criminal business, on the first Monday of January, in the year of our Lord one thousand eight hundred and seventy-three, the Honorable John W. Bacon, a justice of said court, presiding:

"The following-named persons, having been legally drawn and summoned to serve as grand jurors, came into court and answered to their names; to wit, Henry Andrews, Edward T. Bates, Joshua R. Bigelow, Luther Chick, William D. Cook, Nathaniel Cummings, James Daley, Nathaniel Dexter, Horace B. Fuller, [Samuel S. Gay,] John A. Haven, Thomas M. Lewis, Calvin A. Littlefield, William Lutted, Noah H. Marston, Amos Porter, [J. E. C. Peterson,] William B. Stevens, Jr., [John T. Smith,] Benjamin S Shumway, Samuel Tuckerman and William Withington, all of Boston, and Robert Dunning, of Chelsea.

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"After the usual proclamation, the grand jurors were sworn agreeably to the statute, and being charged by the presiding justice, retired to commence their investigations. Henry Andrews, Nathaniel Dexter, Samuel S. Gay, J. E. C. Peterson and John T. Smith, were excused permanently. Subsequently it appeared that John A. Haven was chosen foreman, and Samuel Tuckerman clerk.

"The court ordered a venire to issue for seven additional grand jurors, to attend upon the court on Wednesday, the eighth instant. January eighth, Wednesday, the court met, Honorable Charles Devens, Jr., presiding; the following-named persons, having been legally drawn and summoned on the additional venire to serve as grand jurors, came into court and answered to their names, and were sworn agreeably to the statute; to wit, John W. Chickering, Thomas Crawford, William A. Shapleigh, [John H. Swasey, William J. McPherson,] and Thomas Wright. [William J. McPherson and John H. Swasey, were excused permanently.]"

"Commonwealth of Massachusetts, Suffolk, to wit: At the Superior Court, begun and holden at the city of Boston, within and for the county of Suffolk, for the transaction of criminal business, on the first Monday of February, in the year of our Lord one thousand eight hundred and seventy-three, the Honorable John W. Bacon, a justice of said court, presiding:

"The following-named persons, having been legally drawn and summoned to serve as grand jurors, came into court and answered to their names; to wit, *Henry Andrews*, Edward T. Bates, James T. Barrow, Joshua R. Bigelow, Luther Chick, John W. Chickering, William D. Cook, Nathaniel Cummings, Thomas Crawford, James Daley, *Nathaniel Dexter*, Horace B. Fuller, John A. Haven, Thomas M. Lewis, Calvin A. Littlefield, William Lutted, Noah H. Marston, Amos Porter, William B. Stevens, Jr., William A. Shapleigh, Benjamin S. Shumway, Samuel Tuckerman, William Withington and Thomas Wright, all of Boston, and Robert Dunning, of Chelsea.

"After the usual proclamations, the grand jurors were sworn agreeably to the statute, and then retired to commence their investigations."

The record then set forth the return of the indictment, the arraignment and plea of the defendant, the empanelling of the jury, the conviction and sentence.

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It appeared by the writs of venire facias returned with the record, that James T. Barrow, one of the grand jurors at February term, was the seventh additional juror, who was summoned but did not attend at January term.

H. E. Bolles, for the plaintiff in error. 1. The provisions of the Gen. Sts. *c.* 171, §§ 1, 2, 4, must be strictly followed, and the record shows such a departure from these provisions as made the grand jury an illegal body. The second venire issued when there was no deficiency, and the six summoned on the new venire were sworn and constituted, with the first eighteen, a grand jury of twenty-four. If those excused are to be treated as if never summoned, then the new venire made the number twenty-five. If this course of procedure is to be allowed, twenty-three can be summoned, one excused, and new venires issued for twenty-three more, and a grand jury constituted or packed for any purpose of oppression. It is no answer to say that in this country this is not likely to be. It was intended that we should have "a government of laws and not of men."

2. The same reasons apply to this point. After eighteen had been sworn, six more were sworn all at one time, making a grand jury of twenty-four. This was clearly illegal. These six men were equally incompetent to act. They had no right upon the grand jury. Any one upon it made the findings all illegal. *Commonwealth* v. *Davis*, cited 2 Pick. 559. *State* v. *Symonds*, 36 Maine, 128. Excusing two did not cure the illegality of those remaining. Four of these men served upon the grand jury which found the indictment against the plaintiff, and another came in at the February term, making five of them. If this course can be adopted, then any number can be summoned and sworn, and those not desired can be excused, and this constitutional tribunal become dependent entirely upon the discretion of the presiding judge. See 1 Lead. Crim. Cas. (2d ed.) 260, note to *King* v. *Marsh*.

It may be contended that, because these grand jurors were sworn every term, this original illegality was cured. But this illegality consists not alone in the swearing, but in their being summoned at all; and the terms of court have nothing to do with the grand jury, which lasts six months. Gen. Sts. *c.* 171, § 2. The foreman is chosen for the whole term. Gen. Sts. *c.* 171, § 8. The jurors are sworn for the whole term, and the statute only

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provides for them to be sworn when empanelled. Gen. Sts. c. 171, § 5. It has been expressly decided that they need not be sworn again. *Turns* v. *Commonwealth*, 6 Met. 224. The practice of swearing them at each term of court is not required by law, and can have no force in law.

W. C. Loring, (*C. R. Train*, Attorney General, with him,) for the Commonwealth.

GRAY, C. J. A grand jury in this Commonwealth may consist of not less than thirteen, nor more than twenty-three persons. *Commonwealth* v. *Wood*, 2 Cush. 149. In the present case, the writs of venire facias were originally issued by the clerk for twenty-three grand jurors, as authorized by the Gen. Sts. c. 171, §§ 1, 2. Section 4 provides that, "in case of deficiency of grand jurors in any court, writs of venire facias may be issued to the constables of such cities or towns as the court may direct, to return forthwith such further number of grand jurors as may be required." We are of opinion that this section authorizes the court, whenever the number of grand jurors in attendance is less than the full number of twenty-three, to cause so many additional grand jurors to be summoned as in its opinion, making due allowance for absences and excuses, may insure the filling up of the grand jury to that number; and that the summoning of a greater number does not affect the validity of an indictment found by the legal number of jurors.

Grand jurors sworn by the clerk in the presence of the court are legally charged with the performance of their duties, so far as any action of the court is required. *Commonwealth* v. *Sanborn*, 116 Mass. 61. But if they are at once excused and never join the grand jury in their deliberations, they form no part of the grand jury by which an indictment is found.

The validity of the proceedings in this case depends upon the amended and completed record, returned in obedience to the writ of certiorari issued upon the motion of the attorney general. *Turns* v. *Commonwealth*, 6 Met. 224. By that record it appears that at January term, five of the grand jurors originally summoned were excused permanently, leaving a grand jury of eighteen; that a venire was thereupon ordered by the court to issue for seven additional grand jurors, six of whom appeared and were sworn, and two of these permanently excused, leaving a

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grand jury of twenty-two, and that those twenty-two, together with the seventh additional juror before summoned, constituted the grand jury of February term, by which this indictment was found. It thus appears that the grand jury in question consisted of only twenty-three persons, as the law requires.

The case of *State* v. *Symonds*, 36 Maine, 128, upon which the plaintiff in error relies, differs from this in two particulars: 1st. By the statutes of Maine, the court had no authority to summon additional grand jurors. 2d. The objection was taken before pleading the general issue. See *State* v. *Carver*, 49 Maine, 588; *Commonwealth* v. *Parker*, 2 Pick. 550.

As we are of opinion that no irregularity is shown in the case before us, it is unnecessary to consider whether the objection was seasonably taken. *Judgment affirmed.*

COMMONWEALTH *vs.* GAMING IMPLEMENTS.

Suffolk. November 23, 1875. — January 4, 1876. COLT, J., absent.

The Municipal Court of the city of Boston has jurisdiction to forfeit and order to be sold the furniture, fixtures, or personal property seized in a gaming-house on a search warrant issued from and returned to that court, under the Gen. Sts. c. 170, §§ 1–5, and the St. of 1869, c. 364, at a time when persons were there found playing an unlawful game.

A complaint on the Gen. Sts. c. 170, § 2, as amended by the St. of 1869, c. 364, § 2, alleged belief that "gaming apparatus and implements are used, kept and provided to be used in unlawful gaming in certain rooms resorted to for the purpose of unlawful gaming, in a certain building situated and numbered thirteen and one half in Hayward Place, in Boston, that is to say, in the rooms in the second, third and fourth stories of said building, and also that furniture, fixtures and personal property are contained therein, and may be found therein at a time when persons may there be found playing at some unlawful game, which said rooms are occupied by some person whose name is to your complainant unknown." The warrant issued on this complaint directed the officer to enter the rooms mentioned in the complaint and search for and seize said gaming apparatus and implements, and also to search for and seize all the furniture, fixtures and personal property found in the rooms described in the complaint, at the time when any persons are there found playing at any unlawful game. *Held*, that the premises to be searched were sufficiently described.

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Under the St. of 1869, c. 364, § 2, authorizing the search for and seizure "of all the furniture, fixtures and personal property found in" a gaming-house, the officer is not limited in his right to seize, under a warrant following the words of the statute, merely the personal property liable to condemnation.

An information, filed after the return of a warrant issued on a complaint under the Gen. Sts. c. 170, § 2, as amended by the St. of 1869, c. 364, § 2, after reciting the complaint and the warrant, averred that "by virtue of said warrant" the informant, on a day named, entered the rooms described, and then and there seized certain gaming apparatus and implements, (describing them,) "and your informant did also then and there seize certain furniture, fixtures and personal property, used as the furniture, fixtures and personal property of said rooms." *Held*, that the information showed that the furniture, fixtures and personal property were seized by virtue of the warrant.

Upon the filing of an information after the return of a warrant issued on a complaint under the Gen. Sts. c. 170, § 2, as amended by the St. of 1869, c. 364, § 2, praying for the condemnation of certain gaming apparatus and implements, the clerk issued an order "in accordance with the order of the court," directing a service by copy of the information and order upon the persons in whose possession the articles were found, and by posting up a copy of the order and information on the building, where the seizure was made, fourteen days before the hearing. The return of the officer showed that after diligent search he could not find the parties named, and that their usual places of abode were unknown to him, and that the notice was served by posting a copy, as directed, on the building. *Held*, that publication of notice in the public papers was not required, and that the notice given was sufficient.

COMPLAINT on the Gen. Sts. c. 170, § 2, as amended by the St. of 1869, c. 364, § 2, alleging belief that "gaming apparatus and implements are used, kept and provided to be used in unlawful gaming in certain rooms resorted to for the purpose of unlawful gaming, in a certain building situated and numbered thirteen and one half in Hayward Place, in said Boston, and within the judicial district of said court, that is to say, in the rooms in the second, third and fourth stories of said building, and also that furniture, fixtures and personal property are contained therein, and may be found therein at a time when persons may there be found playing at some unlawful game, which said rooms are occupied by some person whose name is to your complainant unknown," and praying "for a warrant to search there for and to seize the same." The warrant issued on this complaint directed the officer to enter into the rooms mentioned in the complaint, and to search for and seize said gaming apparatus and implements, and bring the said apparatus and implements so found before the court, and also "to search for and to seize all the furniture, fixtures and personal property found in the rooms de-

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scribed in the above complaint, at the time when any persons are there found playing at any unlawful game, and to bring said furniture, fixtures and personal property before said court, to be disposed of and dealt with as to law and justice shall appertain."

The officer's return in the warrant was as follows:

"By virtue of the within warrant I have this day entered and searched the within described premises, and then and there found and seized the following gaming apparatus and implements, the same being then and there kept and provided to be used therein in unlawful gaming, and I now have the same before the court, to wit." [Then followed a description of the property seized.] "I also, at the same time and place, seized the following described furniture, fixtures and personal property, to wit." [Then followed a description of the property.] "The same being seized when persons were there found playing at an unlawful game called faro."

An information was thereupon filed in the said Municipal Court, by the officer serving the warrant, which, after reciting the complaint and the warrant, proceeded as follows: "Whereupon, by virtue of said warrant and in pursuance of law, your informant did, on the twenty-seventh day of said April, enter into the rooms described as aforesaid, the said rooms then being resorted to for the purpose of unlawful gaming, and then and there seized certain gaming apparatus and implements then and there used, kept and provided to be used in unlawful gaming, to wit: one faro table, nine packs of cards, one sweat cloth, five hundred chips, and one deal box and one gaming-table, all of said gaming apparatus and implements then being in the possession of Charles Childs, William Hersey, Charles Moore, Joseph Lyle, Henry Black and Thomas C. Adams.

"And your informant did also then and there seize certain furniture, fixtures and personal property used as the furniture, fixtures and personal property of said rooms, to wit: thirteen chairs, one side-board, two tables, eight spittoons, fifty yards of carpet, one foot stool, four table covers, five tumblers, one pitcher, and two looking-glasses and one rubber mat, the same being found in said rooms at a time when certain persons, to wit, said Childs, Hersey, Moore, Lyle, Black, and Adams, were there found playing at an unlawful game called faro; all of said

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furniture, fixtures and personal property then being in the possession of persons, whose names are to your informant unknown.

"And your informant further avers that the aforesaid warrant, on the twenty-eighth day of said April, was duly returned into said Municipal Court, with the doings of your informant indorsed thereon, and of record appears; that it is not necessary that any of the aforesaid gaming apparatus or implements should be longer kept for the purpose of being produced or used as evidence on any trial; that all of said gaming apparatus and implements, and all of said furniture, fixtures and personal property, are now before said court and hath by law become forfeited, wherefore he prays that the said gaming apparatus and implements may be burned or otherwise destroyed, under the direction of said court, and that the said furniture, fixtures and personal property may be condemned, and adjudged forfeited, and sold in such manner as the court may order, and the proceeds of such sale disposed of as provided by law."

Upon this information the court ordered that an order of notice issue, and that the same be served upon the said Childs, Hersey, Moore, Lyle, Black and Adams therein mentioned, and an order of notice, of which the following is a copy, thereupon issued:

"Commonwealth of Massachusetts. Suffolk, ss. Municipal Court of the city of Boston. Upon the information aforesaid, it is ordered by the court that the informant notify the within described persons in whose possession said gaming apparatus and implements, and said furniture, fixtures and personal property, were found, and any and all persons claiming any right or interest in or to any of the things therein mentioned, to appear before the justices of said Municipal Court, to be holden at said Boston for the transaction of criminal business, on the nineteenth day of May, in the year of our Lord one thousand eight hundred and seventy-five, at ten o'clock in the forenoon, by leaving an attested copy of said information, and of the order of court thereon, with the within described persons in whose possession said gaming apparatus and implements, and said furniture, fixtures and personal property, were found, personally, if they can be found, or at their usual places of abode, if the same are

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known, and by posting up a like attested copy of said information and order on the building therein named, the posting up of said copy, and the serving the same on the within described persons in whose possession said gaming apparatus and implements, and said furniture and fixtures and personal property, were found, to be fourteen days at least before the said last mentioned day, that they may then and there appear to answer said information, and for trial, and to show cause, if any they have, why the said alleged gaming apparatus and implements, and said furniture, fixtures and personal property, should not be forfeited, and why the prayer in said information set forth should not be granted."

On this order of notice the officer made the following return: "On the 29th day of April, in the year of our Lord one thousand eight hundred and seventy-five, by virtue of the within order, I served the annexed information and order as within directed, by posting attested copies thereof on the building situated and numbered thirteen and one half in Hayward Place, in said Boston, being the same building in which the gaming apparatus and implements, and the furniture, fixtures and personal property, described in said information were seized, on the twenty-seventh day of April, current, the serving said information and order as above stated, and the posting the same on the building as above stated, being more than fourteen days before the time within appointed for the trial. And I have made diligent search for the within described persons in whose possession said gaming apparatus and implements, and said furniture, fixtures and personal property, were found, and cannot find them within my precinct, and their usual places of abode are not known to me."

Nelson Tibbetts appeared as claimant of part of the property so seized. The Municipal Court adjudged the property claimed to be forfeited, and ordered it to be sold, and the claimant appealed to the Superior Court.

In that court Tibbetts filed the following claim: "And now comes Nelson Tibbetts, of the city of Boston, and says that he is the lawful owner of the personal property, viz., thirteen chairs, one sideboard, two tables, eight spittoons, fifty yards of carpeting, one footstool, four table covers, five tumblers, one plated

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water-pitcher, two looking-glasses and one rubber mat, described in the above complaint; and he now claims said property, and asks that the proceedings against the same be dismissed, and said property returned to him."

Before the jury were empanelled the claimant filed a motion to dismiss the proceedings, for the following reasons:

"1. The Municipal Court of the city of Boston has no jurisdiction further than to issue the warrant to search, and seize the property, and no authority is conferred by statute upon said court to render the decree therein named, ordering the furniture and other personal property to be sold, and from which decree the claimant appealed.

"2. The proceedings and decree of the court appealed from were void, illegal and without authority of law, and this court cannot take jurisdiction of the proceedings on appeal.

"3. The proceedings in this case are irregular and void, and contrary to the provisions of the Constitution of this state in this, that the furniture and other personal property for which a claim was made were appropriated to public uses without compensation, without a trial by jury, and by the decree of a court having no jurisdiction to adjudge the forfeiture of said property."

This motion was overruled, and the case proceeded to trial. It appeared in evidence that the property claimed was the property of the claimant Tibbetts; that he was not present at the time the gaming took place, and was not interested or connected with the parties who were engaged in the unlawful game; that a game called faro was, at the time of the seizure, being played by the persons named in the proceedings, in the room described in the complaint, &c., upon which the warrant to search was issued, said building being used for a gaming-house; that the furniture and other property seized were used in the apartments where the said game of faro was being played, as the furniture and other property of said building, and were seized as alleged.

The judge submitted to the jury the issues whether the articles claimed were used as the furniture, fixtures and personal property of said building, and whether the said building was a gaming-house, and the said articles found therein at a time when Charles Childs, William Hersey, Charles Moore, and other per

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sons, were therein playing at an unlawful game, to wit, a game called faro. The jury answered in the affirmative.

The claimant then asked the judge to rule as follows:

"1. That the provisions of the St. of 1869, *c.* 364, did not give jurisdiction to the Municipal Court of the city of Boston to adjudge a forfeiture of the furniture and other property of the claimant, and that said court had no authority by statute to issue the decree named in the proceedings.

"2. That if the provisions of said chapter conferred jurisdiction on said court to decree such forfeiture without a trial by jury, said provisions were contrary to the provisions of the Constitution of this state.

"3. That the proceedings had in the Municipal Court were irregular and without authority of law.

"4. That the proceedings, decree, &c., of said court, having been defective, irregular, contrary to the forms of law and the Constitution of the state, this court has no proper application before it for a condemnation of the personal property seized and described in the written claim filed in this court.

"5. That, upon the evidence, the facts as found by the jury and the proceedings before this court, the claimant is entitled to a return of said property."

The judge declined to rule as requested, but did rule, that, upon the proceeding hereinbefore stated, and the facts found by the jury, the government was entitled to a decree of condemnation and forfeiture, and ordered the same to be entered; and the claimant alleged exceptions.

G. W. Searle, for the claimant. 1. The Municipal Court had no authority to decree a forfeiture and sale. The St. of 1869, *c.* 364, § 8, neither in terms nor in spirit confers any such authority. It evidently and expressly contemplates an application to another and different tribunal from the inferior court, otherwise the same language would have been employed in relation to the jurisdiction to issue the warrant and decree forfeiture. Instead of this, the language used is, "application shall be made to a court of competent jurisdiction" for a decree, and the natural inference from the changed phraseology would be that the Municipal Court was not intended as the competent tribunal at all, or else that it was not competent in all cases, that is, in cases

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where the value is over twenty dollars. The natural statutory court for applications for adjudging forfeiture is the Superior Court. It is a civil proceeding. Fish forfeitures are always in that branch of the court. The words used nowhere fix the tribunal of forfeiture. This would seem to imply that it would vary, dependent on the amount. In the case of illegal measures, the language is, "the proper tribunal." Gen. Sts. *c.* 49, § 194. If this is not the correct interpretation of the statute, it is void, being in violation of the provision of the Constitution requiring trial by jury, in all cases where the value of property involved is over twenty dollars. The fact of the right of appeal does not cure the difficulty; as is apparent if there is no appearance in a case. The decision of the court in *Attorney General* v. *Justices of the Municipal Court*, 103 Mass. 456, does not settle this question. The only point there decided was that it was not a proper case for mandamus. All beyond that point is *obiter*.

2. The complaint and warrant did not sufficiently describe the premises to be searched. The rooms to be searched on the second, third and fourth stories are not pointed out.

3. The warrant is defective in authorizing the officer to seize all personal property, whether used in connection with gaming or not.

4. There is no allegation in the information that the property claimed was seized by virtue of the warrant.

5. The order of notice issued on the information was not legally served. Notice should have been given through the newspapers.

W. C. Loring, (*C. R. Train*, Attorney General, with him,) for the Commonwealth.

DEVENS, J. Many of the objections taken by the claimant of the personal property, which has been proceeded against, were fully discussed and passed upon in *Attorney General* v. *Justices of the Municipal Court*, 103 Mass. 456, and although the mandamus there prayed for was not granted, the conclusions stated are not to be treated as the claimant contends as *obiter dicta* only. The nature of the application was such, it being a petition for the purpose of compelling an inferior but important local tribunal to take jurisdiction of certain proceedings under the St. of 1869, *c.* 364, and to consider and determine whether certain

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property found and seized should be condemned and sold under its direction, that it was appropriate to consider and determine what were the powers and duties of that court under that statute as well as under the Gen. Sts. *c.* 170, §§ 1–5, of which it was an amendment, even if in the particular case owing to certain defects in the proceedings no mandamus could properly be issued. So far, therefore, as this case is disposed of by the conclusions there reached, as we are satisfied upon reëxamination with their correctness, it would be superfluous to discuss or even to re-state them. We proceed to consider only those objections not there passed upon.

1. The complaint described with sufficient precision the premises intended to be searched. It alleges that the articles are "in certain rooms" in a building definitely described, "that is to say, in the rooms in the second, third and fourth stories of said building," which said "rooms" are further averred to be occupied by some person whose name is unknown to the complainant, and a warrant is prayed to search "there" for the articles complained against. The warrant authorizes a search of the rooms described in the complaint. The words, "the rooms in the second, third and fourth stories," distinguish them sufficiently from the other rooms in the building in which they are situated, and include all the rooms which answer this description.

2. The complaint, also, and the warrant, in the description of the articles intended to be seized, other than gambling apparatus or implements, follow the words of the St. of 1869, *c.* 364, § 2, which authorizes the search for and seizure of "all the furniture, fixtures and personal property found in such gaming-house." Section 3 renders liable to condemnation and sale all such property so found which was "used as the furniture, fixtures or personal property of such gaming-house," it being intended thereby to subject to forfeiture articles convenient and useful in themselves, which have been put to the improper use of making a gaming-house more comfortable or agreeable. But the officer is not limited, in his right to seize, merely to the personal property thus liable to condemnation. As one of the objects of the seizure is to obtain evidence of the unlawful business conducted in such house, he may also seize the other personal property there, even if it should not be found afterwards subject to

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condemnation as the personal property of the gaming-house, as it may be of importance in furnishing evidence of the business there transacted.

Even if this were not so, a complaint and warrant which were too broad in their terms as including articles which would not properly be liable to seizure, would not be so far defective that the claimant of property properly described therein, and which was liable to seizure, could take advantage of such defect to quash the proceedings.

3. The objection, that the information, filed after the return of the search warrant against the property here claimed, does not show that this property had been seized under the authority of the warrant, cannot avail. The information, after alleging the previous steps and the terms of the warrant, contains a recital of the acts done by the officer who had served it, and the words by "virtue of said warrant," with which this recital commences, apply to and qualify the whole of it, the sentence which states the seizure of the "furniture, fixtures and personal property" by the officer, as well as that which precedes it, which states his entry into the premises and the seizure of the gambling apparatus.

4. Neither is the objection tenable that there was no sufficient notice of the information against the articles sought to be condemned. No notice is provided for by the statute in express terms, but as it would be contrary to the general spirit of our law to decree that property should be destroyed or declared forfeit without a suitable effort to notify the owner thereof, thus affording him an opportunity to be heard in relation thereto, it has been held that notice should be given. *Attorney General* v. *Justices of the Municipal Court*, *ubi supra*. It should be such notice as in the judgment of the court would be reasonable and likely to convey information of the facts and proposed proceedings to the party in interest. While service of the notice, where parties are unknown, by advertisement in the public papers may often be proper, yet it is not the only mode, and often not the most effectual. The order issued by the clerk, "in accordance with the order of the court," directed a service by copy of the information and order upon the persons in whose possession the articles were found, and by posting up a copy of the order and

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information on the building where the seizure was made, fourteen days previous to the hearing. The return of the officer shows that after diligent search he could not find the parties named, and that their usual places of abode were unknown to him, and that the notice was served by posting a copy as directed on the building. This was a reasonable notice, and one which the court, before whom the proceedings were had, might well deem quite as likely to convey the information intended to the parties interested, as any which could be adopted.

Exceptions overruled.

COMMONWEALTH *vs.* TIMOTHY O'BRIEN.

Suffolk. November 22, 1875. — January 4, 1876. COLT, J., absent.

Where a person accused of a criminal offence introduces evidence tending to show that his general reputation is good, it is not competent for the government in reply to put in evidence of particular facts.

On the trial of an indictment for an assault with a knife, the government called a witness who testified that on the evening of the assault a man came to his shop and bought a knife of the same make and style as the knife, which the government contended was in the hands of the defendant when the assault was committed; that he was not sure that the defendant was the man who bought the knife. He was then permitted against the defendant's objection to state a conversation which he had at the time of the sale with the man who bought the knife. *Held*, on a bill of exceptions, which did not state what the conversation was, that the defendant had no ground of exception to the admission of this conversation.

On the trial of an indictment for an assault with a dangerous weapon, to wit, with a knife, there was evidence that the assault was with a jack-knife. The judge ruled that a jack-knife, like that exhibited to the jury, was a dangerous weapon. *Held*, on a bill of exceptions, which did not more particularly describe the knife, that the court could not say as matter of law that the instruction was erroneous.

INDICTMENT charging the defendant with an assault on July 7, 1875, on James M. Ellis, with a certain dangerous weapon, to wit, with a knife, with the intent to kill. Trial in the Superior Court before *Bacon*, J., who allowed a bill of exceptions in substance as follows:

During the trial one Philip Wachtell, a dealer in hardware, was asked by the district attorney if he had ever seen the defendant before; and he answered, "I can't swear I ever did. I

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am not sure he is the man." He then proceeded to state that about six o'clock, on the evening of July 7, 1875, a man came to his shop, looked into his show-case, and wanted to be shown a knife. The district attorney then asked the witness to state the conversation that took place between them. The defendant's counsel objected, but the judge allowed the conversation to go in, notwithstanding the defendant's objection. The defendant excepted to this ruling and the evidence admitted under it. The witness then related the conversation that took place, stated that this person finally bought a knife of him for the sum of forty cents; that it was a jack-knife, and was of the same make and style of the knife shown to him, (referring to a knife which the government contended was knocked out of the defendant's hand on the day of the alleged assault.) On cross-examination the witness reiterated his former statement that he would not swear the defendant was the person who had this conversation, and who purchased the knife. He further stated that he could not swear the knife produced was the knife he sold, as he had sold seven or eight dozen of the same style and make of knives within six months.

During the trial the defendant called several witnesses, who testified to the fact that the defendant had the reputation of being a peaceable and quiet person. The defendant did not testify in the case. After the evidence for the defence was closed, the government called one Davis, an officer, and offered to show by him that the defendant was one of four defendants named in an indictment for an assault upon one John Walsh. The defendant objected, but the judge admitted the evidence, and the defendant excepted.

The government then offered to put in the indictment above referred to, and the same was admitted, against the defendant's objection, on the ground that it was proper and material as affecting the reputation of the defendant. It was admitted by the government, before the judge gave this ruling, that this indictment had been returned at the present term of court, and had been placed upon file. Davis was not asked as to the reputation of the defendant, and no attempt was made by the government, other than by the introduction of this indictment, to refute the evidence introduced by the defendant, as to the reputation of the defendant

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as a peaceable and quiet person. It appeared by indorsements on the indictment that the defendant pleaded not guilty on August 7; on the 9th satisfaction was filed; on the 10th the defendant pleaded guilty, and the indictment was placed on file on payment of costs.

The defendant asked the judge to rule as follows: "1. If the jury believe that the knife was a common pocket-knife carried by O'Brien, (whether a large one or a small one is immaterial in this particular,) and that he did not arm himself with it for the purpose of an assault on Ellis, O'Brien cannot be said, within legal phraseology, to have been armed with a dangerous weapon.

"2. This knife is not in law what is called a dangerous weapon.

"3. It is a question of law for the court to decide whether the jack-knife was a 'dangerous weapon,' and the court is requested to rule in the negative.

"4. If the court refuses to so rule in either of its aspects, and it is thought to be a question of fact, the court is requested to rule that 'a dangerous weapon' *per se* is only a weapon which is intended in its natural and ordinary uses for the purposes of defence or offence only or mainly, and not one which, like a cane, or a case-knife, or an ordinary pocket-knife or jack-knife, which may occasion dangerous injury to life or limb when used with that purpose and that intent."

The judge refused to give either of the rulings, and ruled and instructed the jury as a matter of law that a jack-knife, like that exhibited to the jury, was a dangerous weapon; to which refusal to rule as requested, and to the ruling given, the defendant excepted.

The jury returned a verdict of "guilty of assault and battery with a knife, but without intent to kill and murder, as alleged." The defendant alleged exceptions.

G. W. Searle, for the defendant.

W. C. Loring, (*C. R. Train*, Attorney General, with him,) for the Commonwealth.

ENDICOTT, J. The defendant called witnesses who testified to his general reputation as a peaceable and quiet citizen. The government was then allowed to prove that the defendant had been indicted for an assault, and to put in evidence an indictment,

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wherein he was, with other persons, indicted for an assault upon one John Walsh. To this indictment it appeared that the defendants pleaded not guilty; two days afterwards satisfaction was filed, and on the day following the plea was retracted by the defendants, and they pleaded guilty. The indictment was then placed on file on payment of costs, which were paid, but no sentence was passed. The evidence thus admitted to meet evidence of general reputation, was, in substance, that the prisoner had committed another assault, and had in court admitted or confessed the same by a plea of guilty. And the question is, can a particular fact be proved to rebut evidence of a general reputation.

Where a party undertakes to show that his reputation is good, or that the reputation of the other party or a witness is bad, he cannot put in evidence of particular facts to prove the general reputation he is endeavoring to establish. And to meet evidence of general reputation the opposing party may put in evidence to the contrary of a like general character. But he cannot prove particular facts for the reason that a particular fact does not necessarily establish a general reputation or fairly meet the issue presented, and may also raise collateral issues; and for the further reason that while a party is presumed always to be ready to defend his general reputation, he is not expected to be prepared to meet a distinct and specific charge. *Peterson* v. *Morgan*, 116 Mass. 350.

In *Commonwealth* v. *Hardy*, 2 Mass. 303, 318, it was said by Chief Justice Parsons: "It is not competent for the prosecutor to go into this inquiry, until the defendant has voluntarily put his character in issue, and in such case there can be no examination as to particular facts." See *Commonwealth* v. *Sacket*, 22 Pick. 394; *Commonwealth* v. *Webster*, 5 Cush. 295.

In a case heard before all the judges of England, it was held that, if evidence of good character is given in behalf of the prisoner, evidence of bad character may be given in reply; but in either case the evidence must be confined to the prisoner's general reputation, and the individual opinion of the witness as to his disposition, founded on his own experience and observation is inadmissible. Chief Justice Cockburn, in delivering the opinion of the court, says: "The only way of getting at it [his character]

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is by giving evidence of his general character founded on his general reputation in the neighborhood in which he lives." "It is quite clear that, as the law now stands, the prisoner cannot give evidence of particular facts, although one fact would weigh more than the opinion of all his friends and neighbors. So, too, evidence of antecedent bad conduct would form equally good ground for inferring the prisoner's guilt, yet it is quite clear evidence of that kind is inadmissible." Again, in speaking of the limits of rebutting evidence, where the prisoner puts in evidence of good character, he says, "I think that that evidence must be of the same character and confined within the same limits,— that as the prisoner can only give evidence of general good character, so the evidence called to rebut it must be evidence of the same general description, showing that the evidence which has been given in favor of the prisoner is not true, but that the man's general reputation is bad." The judges who dissented admitted that evidence of particular facts was inadmissible, but were of opinion that the testimony of a witness founded on his own experience and observation went to show disposition and was therefore admissible on the question of character. Chief Justice Erle said: "I agree that evidence of individual facts is to be excluded; but whether the answer given by the witness in this case is in the nature of an individual fact or not I do not stop to inquire, because a question of very general importance has been raised; and, with reference to that question, I am of opinion that the answer, understood as evidence of disposition, is admissible." *Regina* v. *Rowton*, Leigh & Cave C. C. 520; *S. C.* 10 Cox C. C. 25; and 2 Lead. Crim. Cas. (2d ed.) 333, 351, and notes.

It is true that upon cross-examination of a witness, testifying to general reputation, questions may be put to show the sources of his information, and particular facts may be called to the witness's attention, and he may be asked if he ever heard of them; but this is allowed, not for the purpose of establishing the truth of these facts, but to test the credibility of the witness, and to ascertain what weight or value is to be given to his testimony. *Leonard* v. *Allen*, 11 Cush. 241. *Rex* v. *Martin*, 6 C. & P. 562. So in actions for slander, evidence of general bad character of the plaintiff may be put in evidence in mitigation of damages; and where the plaintiff alleges that the defendant has slandered him

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in a particular respect, as for thieving, the defendant may put in evidence for the same purpose that the plaintiff's general reputation in that respect is also bad. *Clark* v. *Brown*, 116 Mass. 504. But we are not aware of any case, where the defendant upon that issue has been allowed to prove a particular act of theft.

We are of opinion therefore that the learned judge erred in admitting this evidence. The government was entitled to rebut the evidence of the defendant, he having put his character in issue, but could not do so by proof of another assault.

The evidence of Wachtell that, on the night of the assault, he sold, to a person who called at his shop, a knife similar to the knife which the government contended was in the hands of the defendant at the time of the assault, was competent; although Wachtell could not positively identify the defendant as the purchaser. The fact that the defendant was the purchaser might have been established by other evidence. As the conversation between Wachtell and the purchaser is not reported, we are unable to say that it was improperly admitted. It might have been entirely immaterial, in no way bearing on the guilt of the defendant. As the defendant has failed in his bill of exceptions to show that it was material, or that he has been injured by it, this exception must be overruled.

The same answer will apply to the ruling that a jack-knife, like that exhibited to the jury, was a dangerous weapon. That it was not a dangerous weapon as matter of law, the defendant has given us in his bill of exceptions no means of determining.

Exceptions sustained.

COMMONWEALTH *vs.* GEORGE T. MALLOY.

Suffolk. November 22, 1875. — January 4, 1876. COLT, J., absent.

If a criminal case has been brought by appeal from a Municipal Court to the Superior Court, and the complaint is sufficient upon its face to authorize a verdict and judgment upon it in the Superior Court, a misrecital of the complaint in the record of the Municipal Court furnishes no ground for dismissing the complaint.

A complaint under the Gen. Sts. c. 163, § 11, which alleges that the defendant at a time and place named "with force and arms did forcibly rescue and take out of

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the lawful custody of said complainant the body of one A., he the said A. being then and there a prisoner arrested by and held in the lawful custody of said complainant, upon the charge of a certain offence, to wit: the crime of drunkenness, and being a disturber of the peace, he the said complainant being then and there a police officer of said city, and being then and there duly authorized to arrest and hold in custody the said A. upon the charge aforesaid," is sufficient without alleging that the defendant knew that A. was in custody.

COMPLAINT by Benjamin H. Hunt, police officer, to the Municipal Court, of the South Boston district in the city of Boston, alleging that the defendant on August 23, 1875, at Boston, "and within the judicial district of said court, with force and arms, did forcibly rescue and take out of the lawful custody of said complainant, the body of one Curren, he the said Curren being then and there a prisoner arrested by and held in the lawful custody of said complainant, upon the charge of a certain offence, to wit: the crime of drunkenness, and being a disturber of the peace, he, the said complainant, being then and there a police officer of said city, and being then and there duly authorized to arrest and hold in custody the said Curren upon the charge aforesaid, against the peace of said Commonwealth, and the form of the statute in such case made and provided."

The defendant was adjudged guilty, and appealed to the Superior Court; and a duly authenticated copy of the complaint, the conviction, and of the other proceedings in the case were transmitted to that court. The record recited that the defendant was brought before the court on the complaint of Benjamin H. Hunt, police officer, setting forth that he the said Malloy, on August 23, 1875, at Boston, "and within the judicial district of said court, with force and arms, did forcibly rescue out of the lawful custody of said complainant the body of one Curren, then legally held by said complainant, a police officer, for drunkenness, and being a disturber of the peace, against the peace of said Commonwealth, and the form of the statute in such case made and provided." The rest of the record is immaterial to the point decided.

In the Superior Court, before the jury were empanelled, the defendant filed a motion to dismiss and quash the complaint and proceedings under the same, for the following reasons:

"1. There is no offence at law set forth in said complaint.

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'2. There is no copy of the conviction of the defendant upon any offence in which the Municipal Court of the South Boston District could have had jurisdiction.

"3. The papers, as transmitted to this court, are irregular and defective. The description in the copy of the complaint on file in this case differs materially and substantially from the description of the offence recited in the copy of the judgment transmitted to this court.

"4. The provisions of the General Statutes in relation to the transfer of papers from lower courts on appeal have not been complied with."

Bacon, J., overruled the motion. The defendant was then tried and found guilty, and alleged exceptions.

J. W. Fox, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

MORTON, J. The Municipal Court transmitted to the Superior Court duly authenticated copies of the complaint, conviction and other proceedings in the case, in compliance with the Gen. Sts. *c.* 173, § 3. The objection, that the descriptions of the offence charged differ in the complaint and in the record of the conviction, is immaterial. The difference is not substantial. If the complaint is sufficient to authorize a verdict and judgment upon it in the Superior Court, the misrecital of it in the record furnishes no ground for dismissing it. *Commonwealth* v. *McCormack*, 7 Allen, 532.

The only other reason urged for quashing the complaint is, that it does not allege that the defendant knew that the person alleged to have been rescued was in the lawful custody of a duly authorized officer. The complaint is brought under the Gen. Sts. *c.* 163, § 11, which provides that "Whoever forcibly rescues any prisoner held in custody upon any conviction or charge of an offence," shall be punished as therein provided. This statute does not merely provide a punishment for the common law offence of rescue; it describes and defines the offence which it is intended to punish. *Commonwealth* v. *Lee*, 107 Mass. 207. Where a statute embraces all the ingredients of the offence intended to be punished, and the language used describes such offence with legal certainty, an indictment or complaint may well charge the offence in the words of the statute. *Commonwealth* v. *Barrett*, 108 Mass.

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302, and cases cited. The words of this statute, "forcibly rescues any prisoner held in custody," import an unlawful taking of a prisoner out of custody by force. The purpose was to punish any person who should thus rescue a prisoner, and the statute does not make a knowledge by the rescuer of the authority of the officer one of the ingredients of the offence. This view does not impugn the general rule of law that in order to make an act criminal it must be done with a criminal intent. A person cannot be convicted unless he effects a rescue by some unlawful act of force. The intent to do such act is a criminal intent, and it is immaterial that he does not know all the consequences of the act. *Regina* v. *Prince*, L. R. 2 C. C. 154.

For these reasons we are of opinion that the complaint in this case is sufficient. It alleges with sufficient certainty that Curren was arrested and held in the lawful custody of a police officer duly authorized, for the crime of drunkenness, and that while so in custody the defendant, "with force and arms, did forcibly rescue and take out of the lawful custody" of said officer the body of said Curren. These allegations include all the acts necessary to constitute the offence intended to be punished by the statute.

Exceptions overruled.

COMMONWEALTH *vs.* BENJAMIN F. COLLBERG.
SAME *vs.* CHARLES E. PHENIX.

Middlesex. Nov. 27, 1875. — Jan. 4, 1876. COLT, J., absent.

Where two persons go out to fight with their fists, by consent, and do fight with each other, each is guilty of an assault, although there is no anger or mutual ill will.

TWO INDICTMENTS: one for an assault and battery by Benjamin F. Collberg upon Charles E. Phenix; and the other for an assault and battery by Phenix upon Collberg. Both indictments were founded upon and supported by the same evidence.

At the trial of the two indictments in the Superior Court, before *Lord*, J., there was evidence for the Commonwealth tending to show that about six o'clock on the evening of Sunday, August

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22, 1875, Collberg and Phenix met near the station of the Boston and Maine Railroad in Malden, and had a slight altercation, as a result of which Collberg bantered Phenix to fight him; that Phenix declined on the ground that he did not want to fight with his best clothes on, but said that if Collberg would wait until he could go home and change his clothes, they would go to some place outside of the town and settle it; that thereupon Phenix did go home and change his clothes, and he and Collberg met at a retired place, remote from habitations and thoroughfares, and fought with each other in the presence of some fifty or seventy-five persons who had gathered there, and that the fight continued until Collberg said that he had enough, when it ceased and the parties went home; that the next day Collberg and Phenix were a good deal bruised, and looked as if they had been fighting.

The defendants testified that they had been acquainted with each other for a period of five or six years, during which time they had always been on the most friendly terms, and were so at the time of the act complained of, and subsequently; that during the period of their acquaintance they had engaged at various times in wrestling matches with each other, all of which had been carried on in a friendly spirit and without engendering any ill feeling between them; that on the day mentioned in the indictment they met towards evening near the station of the Boston and Maine Railroad in Malden, where they had some talk about a recent wrestling match that had taken place in New York, and, growing out of this, as to previous contests of this character which had taken place between them; that, after some talk about their matches, they agreed to go then to some place where they should not disturb any one, and have another trial of their agility and strength in this direction; that they shortly afterwards went to such a place and engaged in a "run and catch" wrestle with each other, without any anger or malice, or any intention to do each other bodily harm; that any injuries which they inflicted upon each other were inflicted accidentally and by mutual consent while voluntarily continuing in such contest.

There was no evidence of any uproar or outcries when the contest took place, or that any one was disturbed thereby, except that the parties were fighting in presence of a crowd of from fifty to one hundred persons who had collected together. After

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the evidence was all in, the defendants asked the judge to instruct the jury as follows:

"If the jury are satisfied that whatever acts and things the defendants did to each other they did by mutual consent, and that the struggle between them was an amicable contest voluntarily continued on both sides without anger or malice, and simply for the purpose of testing their relative agility and strength, then there is no assault and battery, and the defendants must be acquitted."

The judge declined to give this instruction, but instructed the jury upon this branch of the case in substance as follows: "That if the defendants were simply engaged in a wrestling match, that being a lawful sport, they could not be convicted of an assault and battery; but if by mutual agreement between themselves, previously made, they went to a retired spot for the purpose of fighting with each other, and for the purpose of doing each other physical injury by fighting, with a view to ascertain by a trial of their skill in fighting which was the best man, and there engaged in a fight, each endeavoring to and actually doing all the physical injury in his power to the other, and if, in such contest, each did strike the other with his fist for the purpose of injuring him, each may properly be convicted of assault and battery upon the other, although the whole was done by mutual arrangement, agreement and consent, and without anger on the part of either against the other."

To this instruction, and to the refusal of the judge to give the instruction prayed for, the defendants alleged exceptions.

G. S. Scammon, for the defendants.

W. C. Loring, (*C. R. Train*, Attorney General, with him,) for the Commonwealth.

ENDICOTT, J. It appears by the bill of exceptions that the parties by mutual agreement went out to fight one another in a retired place, and did fight in the presence of from fifty to one hundred persons. Both were bruised in the encounter, and the fight continued until one said that he was satisfied. There was also evidence that the parties went out to engage in and did engage in a "run and catch" wrestling match. We are of opinion that the instructions given by the presiding judge contained a full and accurate statement of the law.

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The common law recognizes as not necessarily unlawful certain manly sports calculated to give bodily strength, skill and activity, and "to fit people for defence, public as well as personal, in time of need." Playing at cudgels or foils, or wrestling by consent, there being no motive to do bodily harm on either side, are said to be exercises of this description. Fost. C. L. 259, 260. Com. Dig. Plead. 3 m. 18. But prize-fighting, boxing matches, and encounters of that kind, serve no useful purpose, tend to breaches of the peace, and are unlawful even when entered into by agreement and without anger or mutual ill will. Fost. C. L. 260. 2 Greenl. on Ev. § 85. 1 Stephens N. P. 211.

If one party license another to beat him, such license is void, because it is against the law. *Matthew* v. *Ollerton*, Comb. 218. In an action for assault, the defendant attempted to put in evidence that the plaintiff and he had boxed by consent, but it was held no bar to the action, for boxing was unlawful, and the consent of the parties to fight could not excuse the injury. *Boulter* v. *Clark*, Bull. N. P. 16. The same rule was laid down in *Stout* v. *Wren*, 1 Hawks, (N. C.) 420, and in *Bell* v. *Hansley*, 3 Jones, (N. C.) 131. In *Adams* v. *Waggoner*, 33 Ind. 531, the authorities are reviewed, and it was held that it was no bar to an action for assault that the parties fought with each other by mutual consent, but that such consent may be shown in mitigation of damages. See *Logan* v. *Austin*, 1 Stew. (Ala.) 476. It was said by Coleridge, J., in *Regina* v. *Lewis*, 1 C. & K. 419, that "no one is justified in striking another except it be in self-defence, and it ought to be known, that whenever two persons go out to strike each other, and do so, each is guilty of an assault;" and that it was immaterial who strikes the first blow. See *Rex* v. *Perkins*, 4 C. & P. 537.

Two cases only have been called to our attention, where a different rule has been declared. In *Champer* v. *State*, 14 Ohio St 437, it was held that an indictment against A. for an assault and battery on B. was not sustained by evidence that A. assaulted and beat B. in a fight at fisticuffs, by agreement between them. This is the substance of the report, and the facts are not disclosed. No reasons are given or cases cited in support of the proposition, and we cannot but regard it as opposed to the weight

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of authority. In *State* v. *Beck*, 1 Hill, (S. C.) 363, the opinion contains statements of law in which we cannot concur.

Exceptions overruled.

MEMORANDUM.

ON the twenty-first day of December, 1875, the Honorable OTIS P. LORD, one of the justices of the Superior Court, was appointed a justice of this court, in place of Mr. Justice WELLS, deceased, and took his seat upon the bench on the fifth day of January, 1876.

COMMONWEALTH *vs.* TIMOTHY J. McCARTHY.

Essex. Nov. 8, 1875.—Jan. 29, 1876. COLT, MORTON & LORD, JJ., absent.

On an indictment for the malicious burning of a building on September 10, 1875, it is competent for the government to show, on the question of the intent with which the defendant burned the building on that day, that on August 24 and on September 6, 1875, the defendant set fire to a shed ten feet distant from the building, and connected therewith by a flight of steps.

In a criminal case the admission by the defendant that the act was done with a malicious intent does not preclude the government from proving such intent.

On the trial of an indictment for the malicious burning of a building, the government contended that the motive of the defendant in setting the fire was to destroy his stock of goods, which was insured for more than its value, which was about $500 on the day of the fire; that on that date the defendant had insurance on the stock to the amount of $2000. To meet this evidence the defendant put in office copies of two mortgages on the goods, dated about six months before the fire; one to secure payment of a note of $1000, and the other a note of $700, both signed by the defendant. No other evidence was introduced respecting the mortgages. *Held*, that the mortgages were immaterial, and that the correctness of instructions in regard to them need not be considered.

ENDICOTT, J. The defendant was indicted for the malicious burning of a building belonging to one Gleason. The indictment contained three counts, charging the same offence to have been committed on August 24, September 6 and 10, 1875, respectively. Before the trial began, the government elected to proceed on the third count only.

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The evidence offered by the government that the defendant, on August 24th and September 6th, set fire to a shed ten feet distant from the building, and connected therewith by a flight of stairs, was competent on the question of the intent with which he burned the same building on September 10th, for which offence he was tried. The instructions to the jury properly limited the effect of the evidence to the single purpose for which it was competent. *Commonwealth* v. *Merriam*, 14 Pick. 518. *Commonwealth* v. *Eastman*, 1 Cush. 189. *Commonwealth* v. *Tuckerman*, 10 Gray, 173, 200. *Commonwealth* v. *Shepard*, 1 Allen, 575 *Commonwealth* v. *Choate*, 105 Mass. 451. *Regina* v. *Dossett*, 2 C. & K. 306. The government was not precluded from proving that the building was burnt with a wilful intent, because the defendant conceded that fact before the trial began, and stated that the only question he desired to submit to the jury was whether he set the fire. *Priest* v. *Groton*, 103 Mass. 530.

The government contended that the motive of the defendant in setting the fire was to destroy his stock of goods, which was insured for more than its value. This value, on September 10, was about $500. Evidence was introduced by the government that on that date the defendant had insurance on the stock to the amount of two thousand dollars. To meet this evidence, the defendant put in office copies of two mortgages on the goods, dated January 10 and 22, 1875, respectively; one to secure the pay ment of a note of $1000, and the other a note of $700, both signed by the defendant. No other evidence was introduced respecting the mortgages.

Several instructions to the jury were requested by the defendant in regard to these mortgages and the effect to be given to them. The court gave the instructions, but added certain explanations and qualifications, and also gave an instruction upon the burden of proof, to which the defendant excepted.

In the view taken by the court of this evidence offered by the defendant, it is unnecessary to consider whether the instructions as given were correct. The evidence was immaterial. It did not show that the defendant's insurable interest, or the amount of money he was to receive from the insurers, was less than if there had been no mortgage. It had no tendency to disprove the motive of the defendant to destroy the goods. The inducement to

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destroy them would be quite as great, if they were mortgaged to secure a debt much larger than their value, as if they had not been mortgaged. In either case he would obtain the money, and it was no less an advantage to him because he might have to use it to pay his notes secured by the mortgages.

The rulings of the court as to the legal effect of immaterial evidence do not appear to have injured the defendant, and it is not necessary to consider them. *Exceptions overruled.*

E. T. Burley, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

Inhabitants of Cheshire *vs.* Adams and Cheshire Reservoir Company.

Berkshire. Sept. 16, 1875. — Jan. 28, 1876. Ames, Devens & Lord, JJ., absent.

A town, within the limits of which existing public ways have been changed by the county commissioners under the St. of 1873, *c.* 144, and which has no ownership in the soil of such ways, does not come within the provisions of § 2, as a person or corporation that has sustained damages by reason of the alterations, changes of grade or repairs in such ways; and the objection that such damages cannot be assessed may be taken at the trial before a sheriff's jury summoned to assess the damages.

Petition under the St. of 1873, *c.* 144, for a sheriff's jury to assess the damages caused to the petitioner by the doings of the county commissioners in permitting the respondent to raise a dam owned by it so as to injure certain roads which the petitioner was bound to keep in repair. The jury, under the instructions of the presiding officer, returned a verdict for the petitioner. The verdict was certified to and accepted by the Superior Court; and the respondent appealed. The facts of the case appear in the opinion.

T. P. Pingree & J. M. Barker, for the petitioner.

H. L. Dawes, (*W. T. Filley* with him,) for the respondent.

Endicott, J. The question here raised involves the construction of the St. of 1873, *c.* 144, which purports to be an act in addition to the acts for the erection and regulation of mills. At the time of its passage the owner of a dam had no authority under

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the mill act, Gen. Sts. c. 149, to flow any town way or highway. Persons whose land is overflowed, or otherwise injured by a dam, may obtain compensation therefor; but there being no provision for subjecting land devoted to the public easement of a way to flowage, or regulating in what manner it may be done, it is to be presumed that no encroachment on such public right was intended by the mill act. It has, therefore, been held, that a mill-owner, who by his dam overflows a public way, is liable to be indicted for the maintenance of a nuisance. *Commonwealth* v. *Stevens*, 10 Pick. 247. *Commonwealth* v. *Fisher*, 6 Met. 433. And when a public way is rendered unsafe by reason of such flowage, the town may be indicted for want of repair. In an action of trespass on the case to recover expenses incurred by the town of Andover in repairing a highway, which had been overflowed and greatly injured by the water of the defendant's mill-pond, it was held that the town had no remedy under the mill act, Rev. Sts. c. 116, Gen. Sts. c. 149, and that the action could be maintained. *Andover* v. *Sutton*, 12 Met. 182. There is no remedy under the mill act, because that gives a remedy only to owners of land whose land is flowed.

It appears in this case that there was no evidence of any ownership by the petitioner in the land over which the roads in question are located, other than the general ownership, possession and control pertaining to towns over ways legally located and constructed within their limits, and the duty imposed by law in keeping the same safe and convenient for travel. A town does not in such case own the land over which a way passes. *Perley* v. *Chandler*, 6 Mass. 458. *Millbury* v. *Blackstone Canal Co.* 8 Pick. 473. Nor does it own the easement created by the construction of the way. That belongs to the public. The town must maintain the way because the general law imposes that duty, but in its corporate capacity it has no property in the land under the way, or in the easement of the ways within its limits, and so has no remedy under the mill act as a corporation whose land is flowed or otherwise injured by a dam. Gen. Sts. c. 149, § 4. But, when compelled to repair a defect caused by flowing, a direct damage to the town thus ensues, and it may maintain an action to recover the expenses thus incurred, from the person who created the nuisance in the same manner as against any

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other person who creates a defect in the highway, which has caused the town to incur expense in the discharge of its corporate duty. *Lowell* v. *Boston & Lowell Railroad*, 23 Pick. 24. And in *Andover* v. *Sutton*, *ubi supra*, it was held that while the town could recover from the defendant the expenses of repair, it could not recover costs paid by the town on an indictment against it for want of repair caused by the acts of the defendant, because the costs were incurred in consequence of the town's neglect to perform a duty imposed by law.

A mill owner, therefore, cannot flow a public way by his dam, and can be indicted if he does so. The town in which the way so flowed is located has no remedy under the mill act, for the injury caused by such flowage, but can maintain an action of tort against the mill owner, and recover such sum as it has been obliged by law to expend in repairing such injury.

The St. of 1873, *c.* 144, is intended to give additional powers to mill owners under the authority and direction of the county commissioners. It is provided in § 1, that any person who desires to raise, erect or maintain a dam for mill purposes at such height or in such manner as to overflow or otherwise injure an existing public way, may apply to the county commissioners, setting forth the height at which it is desired to maintain such dam, and the ways which may be injured thereby, and asking for the alteration, change of grade or specific repairs of such ways; and the commissioners, after a hearing on the petition, may order such alteration, repairs or changes of grade "as will, in their judgment, enable the petitioner to raise, erect and maintain such dam, without overflowing or otherwise injuring such ways; and they may give written direction and authority to such petitioner to make at his own expense such alterations, changes of grade and repairs within a reasonable time." It is further provided in § 2 that notice of the hearing shall be given to the towns in which the ways are situated, and to the owners and occupants of lands affected thereby, in the same manner as notice of the laying out of highways is given; and "the commissioners shall assess and order to be paid by the petitioner all damages sustained by any person or corporation by reason of the alterations, changes of grade or repairs ordered by them; and any person or corporation aggrieved by such assessment," may have the damages assessed by a jury, as

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in the laying out of highways. By the provisions of this act, therefore, when an order has been passed by the county commissioners directing alterations, changes of grade and repairs in existing public ways, and the petitioner has complied in all respects with the order in making the changes, he may raise his dam to the height allowed, and flowage to that height is lawful.

The question presented is, whether a town, within the limits of which existing public ways have been changed by the commissioners, comes within the provisions of § 2, as a corporation that has sustained damage by reason of the alteration, changes of grade or repairs in such ways.

Under the mill act, large privileges are conferred upon a person erecting a dam upon his own land for mill purposes. In *Bates* v. *Weymouth Iron Co.* 8 Cush. 548, 553, Chief Justice Shaw says: "It is a provision by law, for regulating the rights of proprietors on one and the same stream, from its rise to its outlet, in a manner best calculated, on the whole, to promote and secure their common rights in it." See *Lowell* v. *Boston*, 111 Mass. 454. As by the existing provisions of law no dam could be maintained in such manner as to injure or interfere with any existing public way, it is to be presumed that when the Legislature passed the St. of 1873, it had in view an extension of the powers and privileges conferred by the mill act, by authorizing changes in public ways under the direction of a tribunal already clothed with authority over that subject matter. New powers being thus conferred upon the commissioners, they are to adjudicate and determine in a given case, whether there is occasion for the exercise of the authority given; or, in other words, whether alterations can be made in the ways to be affected by the dam without seriously affecting the public convenience and necessity in the use of those ways. If they so determine, they may order such alterations to be made as are necessary to enable the petitioner to raise his dam "without overflowing or otherwise injuring such ways." This provision is important, for the commissioners are to make the proposed alteration, so that in their judgment the way cannot be overflowed or injured. At the hearing when these alterations are to be determined, the town is to have notice and may be heard upon that matter. The question, therefore, is to be settled by a board of public officers having

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in charge the public interests, and the power to determine the convenience and necessity of the public in relation to ways, and their adjudication as to the changes to be made and the manner in which the ways are to be altered, repaired or built is conclusive.

The ways when thus altered are public ways, and the duty of maintaining them rests upon the town under the general provisions of law, as in any other case, where a change in a way is ordered by the commissioners. Whether a way is laid out by a town, or by the county commissioners, or by the Legislature, as in those cases where turnpikes have been made highways by acts of the Legislature, the obligation to keep it in repair rests upon the towns within whose territorial limits it lies. The duty to keep it in repair does not depend upon the manner in which the way is laid out, or the alteration is effected, or the form of the proceeding, but arises from the fact that it is a public way within the town limits. An increased expenditure may result from such laying out or alterations, but that is part of the public burden. In laying out turnpikes, or bridges, as highways, by the Legislature, express provisions have sometimes been made, whereby the towns in which the highway lies may be relieved in part of the expense of maintaining such ways by imposing it upon other towns or cities, or upon the county. But in the absence of such provision, the duty of maintaining the highway is upon the town. See *Northampton Bridge Case*, 116 Mass. 442.

Upon examination of this statute, we find no provision which expresses or implies that the town can recover from the respondent for the increased expense cast upon it by the alterations in its ways ordered by the county commissioners. Such expenses are not damages sustained by Cheshire within the meaning of § 2. The damages which the commissioners may assess under that section to persons and corporations must be taken to mean damages to property, and so can only be assessed to those persons or corporations who have sustained such damage by reason of the changes in the ways, and cannot be held to include municipal corporations, which having in their corporate capacity no property in the land, covered by the ways, or in the easements created thereby are only damaged by the increased burden of repair which is imposed by general law.

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The objection to the jurisdiction was taken before the sheriff's jury, before any evidence had been offered, or hearing had, and we are of opinion that the respondent is not precluded from raising this question, because it could have been raised on a petition for *certiorari* to quash the proceedings of the county commissioners in ordering a warrant to issue for a jury. It is a question of jurisdiction, whether the county commissioners or a jury have authority to assess such damages, and the objection may be taken at the trial before the jury. *Verdict set aside.*

NEW HAVEN AND NORTHAMPTON COMPANY *vs.* JOEL HAYDEN & others.

Hampden. January 19. — 25, 1876. COLT & ENDICOTT, JJ., absent.

A contract signed by several persons, whereby "the undersigned" propose that, if the other party to the contract will do a certain thing, "we will undertake" to do a certain other thing, is a joint contract on the part of the signers.

If, pending an action against several defendants sued on a joint contract, one of them dies, his executor or administrator cannot, under the statutes of this Commonwealth, be summoned in to defend the action.

An agreement made by a party to an action, as to the amount of the judgment to be rendered against him, does not affect the form of the remedy against his estate.

CONTRACT against Joel Hayden and seven others. Writ dated in May, 1869. The declaration contained two counts. The first count was as follows: "And the plaintiffs say that the defendants made an agreement in writing, a copy whereof is hereto annexed, whereby said defendants agreed to secure the right of way for the plaintiffs for their railroad, free of expense to the plaintiffs, from the westerly side of the town farm in Northampton, o the western terminus of the road in Williamsburg, for divers good and valuable considerations therein named, on the part of said plaintiffs, all of which have been fully performed by said plaintiffs. But defendants, although requested, have neglected and refused to perform the stipulations on their part to be performed, as set forth in said agreement hereto annexed, whereby said plaintiffs have been put to great trouble and loss."

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The second count was as follows: "And plaintiffs say defendants owe them the sum of forty-five thousand dollars for money paid for defendants by plaintiffs at defendants' request."

The copy annexed consisted of two papers signed by the defendants. The first was as follows: "Williamsburg, January 26, 1866. To J. E. Sheffield, Esquire, Committee of the Northampton & New Haven Railroad Company. The undersigned, representing a large portion of business on the line of the proposed railroad from Northampton to Williamsburg, propose that, if your company will extend their road to Williamsburg as soon as practicable, we will undertake to secure good, responsible subscriptions to the stock of your company, to the amount of 1250 shares, and pay for the same in instalments, as needed for building the road. We also propose to secure the right of way for the road, free of expense to your company, from the westerly side of the town farm in Northampton to the western terminus of the road in Williamsburg, and also to obtain the needful legislation in Massachusetts to merge or consolidate the Northampton and Shelburne Falls Railroad Company with the Northampton and New Haven Railroad Company, so as to form one corporation from New Haven to Williamsburg. It is understood that this proposition is not to be binding on our part, unless we can secure the taking of the amount of stock above named, and also the right of way, or make such arrangement in regard to the same as shall be satisfactory to your company; also that the stock (1250 shares) is not to share in the earnings of the road until the extension is in operation."

The second paper was as follows: "Williamsburg, August 13, 1867. To the New Haven and Northampton Company. The undersigned, whose names are subscribed to proposals submitted in January 1866 to the New Haven and Northampton Company for them to extend their railroad to Williamsburg, hereby agree that said company may go forward and secure the right of way for said road west of Northampton town farm, either by purchase or appraisement by the county commissioners, as said company may think best, and that it shall be done without prejudice to the legal rights of either party named in said proposals."

On June 30, 1873, the following agreement, signed by the parties, was filed in the case: "Judgment shall be rendered for the

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plaintiff as damages, as if upon a verdict, for three fifths of such sum as an assessor to be appointed by the court, unless agreed upon by the parties, shall find the plaintiffs have paid or are bound to pay for their right of way described in the contract, with interest thereon. Said assessors shall report each item, and the grounds of allowance or rejection, and shall also report any questions of law arising in the making of such assessment, if requested by either party, to this court, with right to take the same to Supreme Judicial Court. It is understood that the verdicts, awards and amounts paid shall be considered the value of the premises taken. Any outstanding claims in favor of the Nonotuck Silk Company against the plaintiff are agreed to be adjusted and paid by the said Joel Hayden and others, defendants in the above suit, but without prejudice to any claim said defendants may have on Lucius Dimock or said Nonotuck Silk Co. for contribution."

Joel Hayden died in November, 1873, and Thomas Talbot and others were appointed administrators of his estate in December, 1873. In June, 1875, after the former decisions upon other points of the case, reported 107 Mass. 525, and 117 Mass. 433, the Superior Court issued a summons to the administrators to appear and defend the action. This summons was duly served upon them, and, at October term 1875, they appeared by attorney and moved that the process be dismissed, as having been issued inadvertently and without authority of law, and that they be discharged from further answer.

Allen, J., ruled that the court had no authority to issue the summons and require the administrators to defend the action; and the plaintiff alleged exceptions.

G. M. Stearns & N. A. Leonard, for the plaintiff. 1. The contract was not joint in such a sense as to require all the signers to be joined in the suit, and the action to proceed against all the survivors in case of the death of one. The plaintiff might sue such signers as it desired. The contract does not name any particular parties who shall execute it, but purports to bind each and every one who shall sign. The stipulations are several in their nature, and binding upon those who may deem that their business interests will be subserved by signing it. *Springfield* v. *Harris*, 107 Mass. 532. *Mattoon* v. *Barnes*, 112 Mass. 468.

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Warring v. *Williams*, 8 Pick. 322. *Herrick* v. *Johnson*, 11 Met. 26. *Yale* v. *Wheelock*, 109 Mass. 502.

2. In any event, the death of Hayden severed the contract. His administrators were liable to an action upon the contract after the expiration of one year. Gen. Sts. *c.* 97, § 28. *Burnside* v. *Merrick*, 4 Met. 537, 544. *Curtis* v. *Mansfield*, 11 Cush. 152. More than a year having elapsed since the appointment of the defendants as administrators, and they, being liable to an action, are liable to be summoned in as defendants in this action. The objection which formerly was urged against joining administrators and executors with surviving co-contractors, to wit: that the execution to be issued would run differently against the different defendants, — as to some, against their proper persons and estate, and as to the administrators, against the estate of the deceased, — does not now apply, as under the Gen. Sts. *c.* 129, § 4, there may be separate trials, separate judgments and different executions. *Fuller* v. *Morse*, 4 Gray, 294. *Hawkes* v. *Phillips*, 7 Gray, 284. Since the passage of the St. of 1852, *c.* 312, § 3, there seems to be no reason why the administrators of a deceased defendant, in an action against joint defendants, may not be summoned in to defend the action brought against his intestate, or, after the expiration of a year, brought in as an original defendant, although the action may proceed under the Gen. Sts. *c.* 127, § 11, against the survivors, if the plaintiff desires. The question of the way in which judgment shall be entered does not now arise, as the plaintiff may, after the defendants are in court, discontinue as to all the other defendants than the administrators of the defendant intestate.

3. By the agreement for judgment, Hayden bound himself to abide the judgment to be entered. It thus, by his voluntary agreement, became a part of the case and of the record that he and his estate would remain liable for the judgment that was to be rendered.

C. Delano, for the administrators of Hayden.

GRAY, C. J. This is a joint contract, and was so declared upon in this action. One of the defendants having died intestate, the question now presented is whether the action can proceed against his administrators as well as against the surviving defendants.

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At common law, in case of a joint contract, if one of the joint contractors died, an action at law could not be brought or prosecuted against his executor or administrator, but against the surviving contractors only; and if the contract was several, or joint and several, the executor or administrator of one could be sued in a separate action, but not jointly with the survivors, because he was to be charged *de bonis testatoris*, and they *de bonis propriis*. *Foster* v. *Hooper*, 2 Mass. 572. 1 Dane Ab. 158. *Jenkins* v. *De Groot*, 1 Caines Cas. 122. 2 Wms. Ex'ors (5th Am. ed.) 1576, 1577. By our statutes, if one joint contractor dies, his estate may be charged as if the contract had been joint and several, that is, by action at law against his executor or administrator alone. St. 1799, *c.* 57. Rev. Sts. *c.* 66, § 27. Gen. Sts. *c.* 97, § 28. *Curtis* v. *Mansfield*, 11 Cush. 152. *Sampson* v. *Shaw*, 101 Mass. 145.

The provision of the practice act; St. 1852, *c.* 312, § 8; Gen. Sts. *c.* 129, § 4; that "persons severally liable upon contracts in writing, including all parties to bills of exchange and promissory notes, may all or any of them be joined in the same action," is a rule of pleading, relating to parties severally liable by their own contract, and not to those whose liability, originally joint, must, by reason of subsequent events and operation of law, be enforced severally; and does not affect the survivorship of actions or the remedies against the representatives of parties deceased. This is made evident by those sections of the chapter upon that subject which declare that in case of the death, before judgment, of one of several defendants in a personal action, the cause of which survives, the action shall proceed against the survivors; and which allow such action to be prosecuted against an executor or administrator, only when the deceased is the sole defendant, or the last surviving defendant in the action. Rev. Sts. *c.* 93, §§ 1, 12, 13. Gen. Sts. *c.* 127, §§ 5, 11, 12.

It follows that, by the death of the defendant Hayden, the cause of action was severed, and could be enforced against his administrators by a separate action only. The agreement signed by him in his lifetime, as to the amount for which judgment should be rendered, did not affect the form of remedy by which his estate could be charged after his death. *Prior* v. *Hembrow*, 8 M. & W. 873, 889. *Exceptions overruled.*

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THOMAS LEONARD *vs.* SAMUEL ADAMS.

Worcester. Oct. 6, 1875. — Jan. 7, 1876. AMES & LORD, JJ., absent.

The defendant owned a tract of land and conveyed it by a deed embracing in its description the whole width of a road, called a town road, running along the east side of the premises, its east side being made the east side of the land conveyed. The deed contained a covenant that the premises described were free from all incumbrances, except the aforesaid road, so far as the same was not discontinued. The town had previously voted, while the defendant owned the land, to discontinue a portion of the road bounding on the land conveyed. *Held*, in an action for breach of the covenants of warranty and against incumbrances, contained in the deed, that the deed conveyed the fee of the town road subject to the public easement. *Held*, also, that whatever private right of way certain persons had in the portion of the land, subject to the public easement, was merged in the public way, and that, as such right did not appear to have been acquired before the way was laid out, it could not be revived on its abandonment.

CONTRACT for breach of the covenants of warranty and against incumbrances in a deed from the defendant to the plaintiff, dated January 23, 1858. Writ dated February 10, 1873.

At the trial in the Superior Court, before *Dewey*, J., it was admitted, that at the time of the conveyance to the plaintiff, two owners of adjoining lots had rights of way over the land conveyed, and that for the damages arising from these incumbrances the plaintiff was entitled to recover, and evidence was introduced as to the damages. The plaintiff further contended that he was entitled to recover damages on account of a road referred to in the deed, and of the rights of one Woodcock, and those holding his estate, to pass over the same.

The judge instructed the jury, with the consent of the parties, to return a verdict for the plaintiff for the damages on account of all the rights of way which the plaintiff contended he was entitled to recover for, and to find specially the amount included in said verdict on account of the road and right of way of Woodcock.

The jury returned a verdict for the plaintiff for the sum of $266, and assessed the damages for the incumbrance of the road and right of way of Woodcock at $90. The case was thereupon reported for the consideration of this court; if the plaintiff was entitled to recover for the last named incumbrance, judgment was to be entered on the verdict; otherwise for the sum of $176. The facts reported appear in the opinion.

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M. J. McCafferty, for the plaintiff.

H. O. Smith, for the defendant.

COLT, J. The plaintiff seeks to recover for a breach of the covenants of warranty and against incumbrances contained in the defendant's deed to him in 1858. Among other causes of action he claims damages on account of a certain town road referred to in the deed as the road to Burncoat Pond; and also for the right of one Woodcock, and those claiming under him, to pass over the same. In 1841, while the defendant was owner of the premises, the town voted "to discontinue the town road from near Samuel Adams to Burncoat Pond, so called, to a bridle road."

The deed, under which the plaintiff claims, embraces in its description the whole width of the road. It is called a town road; it runs along the east side of the premises, and the east side of it is made the east side of the lot conveyed. The deed contained a covenant that the premises described "are free of all incumbrances, except the aforesaid road, so far as the same is not discontinued," with the usual covenant to warrant and defend the same.

This deed, by its true construction, conveys only the fee in the road subject to the public easement, if any, then existing in it. The description of it as a town road, with the restricted covenant against incumbrances, implies that the land was subject to the public easement, except so far as the road had been discontinued by the proper authorities. *Stetson* v. *Dow*, 16 Gray, 372. *Hollenbeck* v. *Rowley*, 8 Allen, 473. *Newhall* v. *Ireson*, 8 Cush. 595. *Boston* v. *Richardson*, 13 Allen, 146.

It follows that the town way, or so much of it as then remained, was not an incumbrance within the meaning of the covenant, because the covenants in a deed attach only to the estate or premises intended to be conveyed. The words granted premises mean that interest in the land described which the deed purports to convey. *Sweet* v. *Brown*, 12 Met. 175. *Hoxie* v. *Finney*, 16 Gray, 332.

As to the other incumbrance, if the town road was not legally discontinued by the proceedings in 1841, then the right of Woodcock, and those holding his estate, to pass over the same was no incumbrance on the granted premises, because it was merged in

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the public easement. And if the public easement was discontinued, then the facts in the case do not show a private right of way acquired by Woodcock, by grant or otherwise, before the town road was laid out, which would revive upon its abandonment. Nor has the right been since acquired by grant, and could not within the time limited have been secured by adverse use.

The plaintiff fails to establish these alleged incumbrances, and as to the covenant to warrant and defend, it is sufficient to say that it is not claimed that there has been any eviction by paramount title, or anything equivalent thereto. By the terms of the report the entry must be

Judgment, for the smaller sum, for the plaintiff.

EDWIN SCHOFIELD *vs.* THOMAS MCCONNELL & trustee.

Worcester. Oct. 7, 1875. — Jan. 7, 1876. AMES & LORD, JJ., absent.

A., by an instrument in writing and duly recorded, assigned to B. on December 13, 1873, "all claims and demands which I now have, and all which at any time between the date hereof and the first day of February, 1875, I may and shall have against C., for all sums of money due, and for all sums of money and demand, which at any time between the date hereof and the said first day of February, 1874, may and shall become due to me as laborer." *Held*, on a trustee process served after February, 1874, and before February, 1875, that the assignment was not void on its face, but applied to all wages until February 1, 1875.

A. being indebted to B. and other creditors, assigned to B., by an instrument duly recorded, his wages due and to become due from C., until a certain date, B. having at the time knowledge of the other debts. B. received the wages monthly, and applied part of them to his debt and part, at A.'s request, for necessaries for A.'s support, he having no other means of subsistence. At the time of a trustee process, brought by one who was a creditor of A. when the assignment was made, against A., in which C. was summoned as trustee, and B. appeared as claimant, it appeared that money was still due from A. to B., although B. had received money enough, had he so applied it, to pay his own debt. It was found as matter of fact that the assignment and the subsequent arrangements between A. and B. were not made with any intent on their part to defraud the creditors of A. *Held*, on a bill of exceptions setting forth the above facts, that the court could not say as matter of law that the assignment was fraudulent. *Held*, also, the appropriations made by the parties being valid, that the law of appropriation of payments, applicable when no appropriations are made by the parties, did not apply.

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TRUSTEE PROCESS to recover $29 for medical attendance. Writ dated August 28, 1874. The defendant was defaulted. The Washburn & Moen Manufacturing Company, summoned as trustee, admitted that, at the time of service upon it, there was in its hands the sum of $108.30, due the defendant. Sibley Putnam appeared as claimant of the funds in the hands of the trustee, by virtue of the following assignment, under seal, dated December 13, 1873, signed by the defendant, and duly recorded:

"Know all men by these presents, that I, Thomas McConnell, of Worcester, in the county of Worcester and Commonwealth of Massachusetts, in consideration of one hundred dollars to me paid by Sibley Putnam, of Worcester, the receipt whereof I do hereby acknowledge, do hereby assign and transfer to said Sibley Putnam all claims and demands which I now have, and all which, at any time between the date hereof and the first day of February, 1875, I may and shall have against Washburn Moen Manufacturing Company, for all sums of money due, and for all sums of money and demand which, at any time between the date hereof and the said first day of February, 1874, may and shall become due to me, for services as laborer, to have and to hold the same to the said Sibley Putnam, his executors, administrators, and assigns forever. And I, Thomas McConnell, do hereby constitute and appoint the said Sibley Putnam and his assigns to be my attorney irrevocable in the premises, and to do and perform all acts, matters and things touching the premises, in the like manner to all intents and purposes, as I could if personally present."

At the trial in the Superior Court, before *Dewey*, J., it appeared in evidence that the defendant was a workman, having a large family, with no means of support, except his daily wages; that he had been for several years in the employ of the trustee, who paid its workmen once each month; that he applied several years before to the claimant, a grocer, to furnish him with groceries for his family as he required them; that the claimant refused to sell to him on account of his poverty, unless the defendant would give him as security therefor an assignment of his wages on the trustee similar to that above set forth; that after receiving said assignment the claimant supplied the defendant with groceries as he needed them from day to day, and at the end of each month the claimant received from the trustee the wages of the defend-

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ant; that, the defendant having no other means to buy fuel or meat, the claimant usually paid to or for the defendant small amounts for these and other necessary purposes, which were either charged to the defendant or deducted from the amount received for his monthly wages, and the balance was applied to the payment of the claimant's account for groceries, but, owing to these other necessities of the defendant, there was always a balance due to the claimant; that the amount of this balance continued to increase until July, 1873, when, after applying that monthly payment, the balance was $94.66.

The judge found as a fact that it was then agreed by the parties that each future monthly payment should be applied to paying each future monthly account in the first instance, leaving still outstanding this $94.66, to be paid from any excess of funds; that, at the time of the service on the trustee, this old account had been reduced, by a payment of $10, to $84.66, and the amount due on the new account to the claimant was nearly $50, both together exceeding the amount of funds in the hands of the trustee.

The judge also found as a fact that the assignment was not made, nor were the subsequent arrangements between the parties made, with any intent on the part of the claimant or the defendant to defraud the creditors of the latter, but were made as the claimant properly required security, and that the payments of money by the claimant to or for the defendant were only in cases of necessity for his support.

It appeared that at the time the claimant took the present assignment, having held previous ones, he knew the defendant was indebted, and, after he took this assignment, knew that he was indebted to the plaintiff and several others, and had been for a long time, and that, with that knowledge, from the moneys received under this assignment, he had paid over at different times to the defendant, or to others for his benefit, as heretofore stated, amounts sufficient, if they had been reserved and applied, to have paid the claimant's full account against the defendant, and left a sufficient balance in the trustee's hands to satisfy the plaintiff's claim; that he had continued to do so until the present time, and had paid over to the defendant since July, 1873, enough to pay the claimant's entire claim and the demand of the plaintiff.

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The plaintiff asked the judge to rule as follows: "1. That the assignment was not valid on its face, and would not hold the funds after February 1, 1874, as against a trustee process.

"2. That if, at the time of service on the trustee, the claimant had received enough to have paid his debt, since he took the assignment, he cannot claim the funds in the hands of the trustee in this action, it being admitted that the claimant knew that there were creditors whom the defendant owed.

"3. That the claimant having paid over money to the defendant, knowing that there were other creditors, and the payments being received without any special application, the law will apply them."

The judge refused the first and second requests, and on the third ruled that if no agreement was made, nor any special application, the payments would be applied to the oldest outstanding items; but that this rule did not apply when an agreement was made as to the application.

The judge found for the claimant; and the plaintiff alleged exceptions.

C. A. Merrill, for the plaintiff.

F. T. Blackmer, for the claimant.

COLT, J. The court could not properly rule as matter of law that the assignment was not sufficient to transfer all wages due after February 1, 1874. The sentence in which this date occurs expressly refers to the more prominent previous clause extending the assignment to February 1, 1875, and is plainly not intended to limit its effect. It is a manifest clerical error.

The facts relied on by the plaintiff to impeach the validity of the assignment were entitled to consideration as bearing upon its alleged fraudulent character. But on that point it was found as a fact that there was no intent on the part of the claimant or the defendant, either in making the assignment or in the transaction under it, to defraud the creditors of the latter. The payment of money by the claimant to or for the defendant, only in cases where it was necessary for his support, would not be conclusive evidence of fraud, or impair his claim to indemnity out of the wages assigned for all supplies furnished, and this claim amounts to more than the funds in the hands of the trustee.

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The appropriations made by the parties at the time the several sums were received, if made with no intention to defraud creditors, were valid, and there was no occasion to apply the rule of law which prevails, when no appropriations are made by the parties. *Exceptions overruled.*

SAMUEL K. BUELL *vs.* COUNTY OF WORCESTER.

Worcester. Oct. 7, 1875. — Jan. 7, 1876. AMES & LORD, JJ., absent.

At the trial upon a petition to the Superior Court, for a jury to assess the damages caused to the petitioner's estate by raising the grade of a highway, it appeared that the petitioner, in anticipation of the change of grade, had built foundation walls to a height of about six feet above the old grade, and that the new grade was established two or three feet higher than the petitioner anticipated. The petitioner was then permitted, against the respondent's objection, to introduce evidence in relation to putting the property in the same position relatively as before, and the expense thereof. The judge admitted the evidence subject to instructions that that would be a mode of determining the damages, provided that would be the course which a prudent man would adopt in relation to property in that condition, provided such expenditures were the most economical way of diminishing the damages caused by the change of grade; that it was for the jury to decide what course a prudent man would adopt in relation to such property after the location and change of grade; and that the damages awarded the petitioner were in no event to exceed the amount of the diminution in the value of the petitioner's property owing to the laying out of the street and the change of the grade. *Held*, that the evidence was rightly admitted, and that the instructions were correct.

PETITION to the Superior Court, for a jury to assess damages alleged to have been caused to the petitioner's land by the laying out of a highway in Worcester.

At the trial before *Dewey*, J., it appeared that the highway in question was laid out by the county commissioners on March 16, 1871, and that the laying out consisted in widening a former way, called Chandler Street, about ten feet, and raising the grade thereof at various points, among others, opposite the premises of the petitioner about seven feet.

The petitioner's premises consisted of thirty thousand feet of land upon the southerly side of old Chandler Street and on the westerly side of Bellevue Street, and the lot was nearly rectangular. Early in 1870 the lot was low and swampy, with a

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brook passing through it from north to south, which also passed under Chandler Street, but there was a mound of hard land near the southeast corner of the lot. The relation of the lot to the former highway, before any work under the new laying out had been done upon it, was, that it was lower than the grade of the old street, and the land descended from the sides of both Bellevue Street and Chandler Street. By the laying out in question, about fifty feet in area of the petitioner's land was taken, and, the new street being extended farther north than the old one, a strip of about one hundred and fifty feet in area was left outside the new street adjacent to the petitioner's land.

The petitioner offered evidence tending to show that he bargained for the land in January, 1870, and in February and March, 1870, began digging upon it; that he cut down the mound and used it for grading up the rest of the lot, east of the brook; that he graded that part of the lot so as to make it quite solid ground; that the deepest filling was ten feet; that he dug trenches near the east side of the lot, for the foundation walls of a factory. The respondent objected to this evidence, but it was admitted by the court for the purpose of showing the condition of the land at the time of laying out of the street, and for no other purpose. The petitioner also offered in evidence that he constructed in 1870, near the east side of said lot and about twenty feet from the southerly line of said Chandler Street, as laid out by the county commissioners, the stone foundation walls of a building intended by him for a factory. This wall was raised to a height averaging about six feet above the old grade of Chandler Street, at a point opposite the wall itself, and was raised to that height in order that it might conform to and be available with the anticipated new grade of Chandler Street; but the new grade of Chandler Street was actually raised about a foot higher than the top of said foundation walls.

The petitioner contended and offered evidence tending to show that the new grade of Chandler Street was established two or three feet higher than he anticipated when he built said walls; that the premises east of the brook, constituting three fourths of the entire lot, could be put relatively in the same position as before the alteration of the street, by raising the walls and grading up the lot east of the brook to correspond with the raised walls;

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that this would require the walls to be raised three and six tenths feet, and the lot in the same proportion, and the part of the lot between the wall and Chandler Street to the present level of the street; that this plan would require the construction of retaining walls; that another method would be to raise the walls as before, construct a driveway from Bellevue Street on the south side of the lot, put in a retaining wall on Bellevue Street, and to grade from the building to the present level of Chandler Street; that the expense of the first method would be about $4200, and the expense of the latter method about $2100.

The respondent objected to all this evidence in relation to putting the property in the same position, relatively, as before, and the expense thereof, as incompetent, but the judge admitted the same for the purposes, and subject to the restrictions stated in the instructions to the jury. At the time of the laying out, the walls had been completed, and no work was ever done on them and no building ever erected on them afterwards.

The judge instructed the jury as follows: "Much evidence has been introduced of the expense of putting the property, relatively, in the position it was before, or as near as it could be placed. This is proper for your consideration, and would be a mode of determining the damages, provided that would be the course which a prudent man would adopt in relation to property in that condition and situation, provided such expenditures were the most economical way of diminishing the damages caused by the change of grade. It is for you to decide what course a prudent man would adopt in relation to such property after the location and change of grade. The damages awarded the petitioner are in no event to exceed the amount of the diminution in the value of the plaintiff's property, owing to the laying out of the street and the change of the grade." The jury assessed damages at $2450; and the respondent alleged exceptions.

H. B. Staples, for the respondent.

G. F. Verry, for the petitioner.

COLT, J. The petitioner claimed damages occasioned by a change of grade in the street. He was entitled to recover the diminution in value occasioned to his property in the condition it was when the change was made from a lower to a higher grade. Upon that question, and as one of the steps in determining it

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the jury might consider what expenses a prudent man would reasonably incur in putting the property, with reference to the new grade, in as good condition as it was before, being limited in their verdict to compensation for the diminished value of the property. This excludes a recovery for particular improvements in the estate, or changes unreasonably made, or not necessary to put the property in as good condition as before. The rule has been frequently applied in cases of this description and in analogous cases. *Foster* v. *Boston*, 22 Pick. 33. *Plympton* v. *Woburn*, 11 Gray, 415. *Chase* v. *Worcester*, 108 Mass. 60. *Hartshorn* v. *County of Worcester*, 113 Mass. 111. *Bates* v. *Ray*, 102 Mass. 458.

There is nothing in the condition of the property which should vary the rule, or which calls for the exclusion of the evidence offered. The petitioner had the right to construct the foundation of his building so as to meet the anticipated change of grade. If the change brought the street higher than he anticipated, it is difficult to see why the respondent has suffered less than if his foundations had been adapted to the still lower grade of the old street. The petitioner had the right to use and increase the profitable capacity of his estate. And his purpose seems to have been to diminish rather than increase his claim for damages.

Exceptions overruled.

CROMPTON CARPET COMPANY *vs.* CITY OF WORCESTER.

Worcester. January 5. — 7, 1876. AMES & DEVENS, JJ., absent.

Under the St. of 1871, *c.* 361, authorising the city of Worcester to supply itself with pure water, and providing in § 3 for the payment of damages by the city to persons injured thereby, and for the appointment by the Superior Court of three commissioners to assess the damages, an order of the Superior Court appointing such commissioners is interlocutory merely, and exceptions thereto cannot be entered in this court until after a final disposition of the case in the court below.

PETITION under the St. of 1871, *c.* 361, § 3, for the appointment of commissioners to assess the damages sustained by the petitioner by the taking, by the city council of the city of Worces-

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ker, of East or Lynde Brook, in the town of Leicester, to supply the city with pure water.

In the Superior Court, before *Colburn*, J., the petitioner contended that certain facts, put in evidence by the respondent, did not constitute a defence to the granting of the petition. The judge so ruled, and ordered commissioners to be appointed; and the respondent alleged exceptions.

W. S. B. Hopkins & F. T. Blackmer, for the respondent.

T. L. Nelson, for the petitioner.

BY THE COURT. The order appointing commissioners was interlocutory in a case pending in the Superior Court, and exceptions thereto cannot be entered in this court until after a final disposition of the case in the court below. St. 1871, *c.* 361, § 8. *Safford* v. *Knight*, 117 Mass. 281. *Gifford* v. *Rockett*, *ante*, 71. *Rose* v. *Taunton*, *ante*, 99. *Exceptions dismissed.*

LAVOISIER HILL *vs.* GEORGE CROMPTON & another, executors.

Worcester. Oct. 8, 1875. — Jan. 10, 1876. AMES & LORD, JJ., absent.

Under an answer denying each and every allegation in the plaintiff's declaration, the plaintiff is bound to make out his case; and all the facts necessary to be proved by him for this purpose are put in issue.

In an action against an executor to recover for services and disbursements in a suit brought by the plaintiff against a corporation for which it was contended the testator promised to pay, the plaintiff relied upon the testimony of a witness called by him that the testator had before that suit was brought agreed to pay for the expenses thereof, if it could not be settled for a certain amount. The defendant was permitted, against the plaintiff's objection, to testify for himself that, at an interview, during the pendency of that suit, at which the testator, the witness for the plaintiff and himself were present, the testator stated that the defendant was to look after his matters, that he wanted the defendant to understand that he never had any transactions with the corporation or any suit that was to be or had been brought against it, to which the witness made no reply, and that the testator further said that he had not long to live and wanted them to know about it. The jury were instructed that if the persons in whose presence the statements were made by the testator had no authority from the plaintiff to act in the matter to which the statements related, the jury were not to consider those statements as testified to by the defendant. *Held*, that the evidence was rightly admitted, as tending to contradict the plaintiff's witness, although the statements were made by the testator after the suit was brought. *Held*, also, that the instruction was sufficiently favorable to the plaintiff.

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In an action against an executor to recover for services and disbursements in a suit brought by the plaintiff against a corporation, for which it was contended the testator promised to pay, the plaintiff relied upon the testimony of a witness that in reply to a question of the plaintiff as to what they should do about the suit, the testator said, "If you can settle the matter by taking off $400 or $500, do so; if not, fight it, and I will pay the bill." Another witness gave substantially the same testimony, except that he did not refer to the matter of attempting a settlement as stated by the first witness. *Held*, that the jury were rightly instructed that the plaintiff could not recover without showing that he attempted to settle with the corporation by throwing off $400 or $500 before he brought the suit, although the answer contained only a general denial.

On a bill of exceptions to the refusal of a judge to set aside a verdict and grant a new trial, asked for on the ground that the verdict was for a larger amount than was warranted by the instructions given, this court will not sustain the exceptions unless they present sufficient facts to enable the court to perceive that the judge erred in matter of law in holding that there had been no error in the computation to the injury of the excepting party.

CONTRACT, by the surviving partner of the firm of Hill & Chapman, on an account annexed, for money paid to E. C. Cleveland, the defendants' testator, and for services and expenses incurred in the prosecution of a suit brought by the plaintiff, as such surviving partner, against the Newburg Woollen Company, at the alleged request of Cleveland, to recover payment for certain machinery which Cleveland manufactured, as the agent of Hill & Chapman, for the Newburg Woollen Company, and delivered to said company. Writ dated October 27, 1873. The account annexed showed a debit of $4353.68, and a credit of $3700.10, leaving a balance due of $653.58. The first twenty-six items of the account related to the expenses and services in the suit against the Newburg Woollen Company, and amounted to $2093.79. The answer denied each and every allegation in the plaintiff's declaration, except as to the credit side of the account. The defendants also filed a declaration in set-off, showing a debit of $3797.57, and a credit of $2261.82, leaving a balance of $1535.75. The answer to the declaration in set-off admitted debits to the amount of $3026.09, and alleged that credit was given therefor in the plaintiff's account. It also admitted the credit side of the account and denied the other items.

The case was referred to an auditor, who found for the plaintiff for $653.58, and interest.

At the trial in the Superior Court, before *Dewey*, J., the only matter of fact in dispute was as to the liability of the defendants

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for the services and disbursements in the action against the Newburg Woollen Company. It appeared in evidence that said company refused to pay for the machinery on the ground that it was defective and not delivered on time.

The plaintiff put in evidence the auditor's report, and the deposition of Edwin S. Lawrence of New York, who testified that he was the salaried superintendent of the machinery department of Hill & Chapman, from May, 1870, to November, 1872; that in the latter part of 1870 Cleveland furnished machinery, as agent for Hill & Chapman, to the Newburg Woollen Company; that he, Lawrence, made the contract, as agent for Hill & Chapman, between them and Cleveland; that a greater part of the communications between Cleveland and Hill & Chapman were made by him; that he heard the alleged contract between Hill & Chapman and Cleveland, under which the plaintiff claims they sued the Newburg Woollen Company, and on which this suit was brought, and his testimony was in substance as follows: "I heard a conversation between Cleveland and Hill & Chapman, concerning the expenses of the suit in New York, in 1870, after the machinery had been shipped to the Newburg Woollen Company, and set up in their mill; the company had refused to pay the bill, claiming that the machinery was not according to contract and not delivered on time; just before this conversation, Hill, Cleveland and I had been to the office of Orrin Skinner, a lawyer, to consult with him about collecting the claim; after we left his office, Hill said to Cleveland, 'What shall we do about it?' referring to the claim against the company; Cleveland replied, 'If you can settle the matter by taking off $400 or $500 do so; if not, fight it, and I will pay the bill.'" He also testified that he went to Worcester, on July 26, 1871, to assist Mr. Skinner, who had been employed by Hill & Chapman, in taking the deposition of Cleveland, to be used in the Newburg suit; that he attended to the taking of said deposition as agent of Hill & Chapman; that he went to several other places, and at the request of Mr. Skinner, to assist in getting testimony for the plaintiffs in the suit; that he never had any conversations with Cleveland in relation to the suit against the Newburg Woollen Company, except the one before referred to in New York, and one at the time Cleveland's deposition, to be used in the suit against the Newburg Woollen Company, was taken, in Worcester, about July 26, 1871.

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The plaintiff also put in evidence the deposition of one Jackson, whose testimony was substantially the same as that of Lawrence as to the agreement of Cleveland to pay for the suit against the company, and as to the direction given by Cleveland to sue the company upon its refusal to pay for the machinery delivered by Cleveland, except that Jackson did not refer to the matter of attempting a settlement as stated by Lawrence.

The defendants, against the plaintiff's objection, were allowed to introduce the testimony of W. W. Rice, one of the defendants, as to a conversation between Cleveland and Lawrence, about July 26, 1871, at the time the deposition of Cleveland was taken, to be used in the suit against the Newburg Woollen Company, and after the suit was brought against the company, which testimony was as follows: "I am one of the executors of Cleveland, and had charge of all his affairs; I had a conversation with Cleveland and Lawrence, at the time said deposition was taken, and before they began to take the same. Cleveland said to Lawrence that he had sent for me because I was to look after his matters; that he wanted me to understand that he had nothing to do with the Newburg Woollen Company or any suit that was to be or had been brought against the company; that the business was transacted with Hill & Chapman; that he never had any transactions with the Newburg Woollen Company; to which Lawrence made no reply; that Cleveland further said in that conversation to Lawrence and me, that he had not long to live, and he wanted us to know about it."

Neither Hill nor Chapman were present at this conversation; and there was no evidence except as hereinbefore stated that the agency of Lawrence extended to the subject matter of said conversation, or that he had any authority except as hereinbefore stated, to bind the plaintiff by any part he might take in any conversation. There was no evidence that Lawrence heard said statement, except as aforesaid, and the statement of Mr. Rice on cross-examination that the remarks were made to all in the room, including him and Lawrence and the magistrate and the lawyers on both sides of the Newburg Woollen Company suit, and that he and Lawrence got on the right of Cleveland, at the time they were made, and Lawrence heard the same.

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The plaintiff objected to the admission of this evidence or any evidence tending to disprove the defendants' liability, on the ground that it was not admissible under the answer, and that he had no notice of such defence, and could have brought sufficient evidence to rebut the same; and also contended that the evidence thus introduced was incompetent in the absence of the plaintiff, and incompetent, as being a statement after suit was brought by his alleged request, to disprove the alleged contract to pay the expenses of said suit, made before said suit was brought.

There was no evidence at the trial to support the defendants' declaration in set-off, except the admissions contained in the answer thereto; and there was no evidence of any attempt to settle by the plaintiff with the Newburg Woollen Company before suit.

The jury were instructed that, if they found for the defendants, they could not find for items in the declaration in set-off which were not admitted upon the pleadings.

As to the testimony of Mr. Rice, the judge instructed the jury "that if the persons in whose presence said statements were made by said testator had no authority from the plaintiff to act in the matter as to which the testator made the statements, then the statements were not competent for the jury, and the jury would not consider as in the case the statements testified to by Mr. Rice."

The judge also instructed the jury that if they believed that the contract between the plaintiff and Cleveland was as testified to by Lawrence, in regard to paying the expenses of the suit against the Newburg Woollen Company, then the plaintiff could not recover these expenses without showing that he attempted to settle with the Newburg Woollen Company, by throwing off $400 or $500 before they brought a suit against them.

The jury found for the defendants, and assessed damages in the amount of $1535.75. The verdict was rendered March 23, 1875. The jury were instructed to give interest on the amount they found due from the date of the writ.

The plaintiff moved to set aside the verdict, on the ground that it was unwarranted by and contrary to the evidence, and contrary to law and the ruling of the judge as to the amount of the verdict. This motion was overruled by the judge.

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To these rulings and to the admission of the evidence objected to, the plaintiff alleged exceptions.

W. A. Gile, for the plaintiff.

F. T. Blackmer, for the defendants.

DEVENS, J. Upon an answer denying each and every allegation in the plaintiff's declaration, the plaintiff is bound to make out his case, and all the facts necessary to be proved by him for this purpose are put in issue. *Davis* v. *Travis*, 98 Mass. 222. While the defendants pleaded nothing in avoidance or discharge of the liability, which the plaintiff sought to impose upon the estate of their testator, but simply negatived the averments of the declaration, they were entitled by any appropriate evidence to meet that offered by the plaintiff, and thus disprove their liability. Under an answer denying the making of a promissory note, an alteration since it was signed may be proved. *Lincoln* v. *Lincoln*, 12 Gray, 45. And a defendant in replevin, under an answer denying the plaintiff's title and right of possession, may prove property in himself. *Verry* v. *Small*, 16 Gray, 121. *Hawes* v. *Ryder*, 100 Mass. 216, and cases cited.

The matter in controversy related to the liability of the defendants' testator for services and disbursements in a suit brought by the plaintiff against the Newburg Woollen Company, and he relied upon the testimony of one Lawrence that Cleveland had before that suit was brought agreed to pay for the expenses thereof. It was shown by the testimony of Mr. Rice, that while that suit was pending, and while Lawrence was acting for the plaintiff at the time of taking a deposition, Cleveland informed Lawrence in his presence that Rice was to act for him in his matters, that he wanted Rice to understand that he had nothing to do with the Newburg Woollen Company, or any suit that was to be or had been brought against that company; that the business was transacted with Hill & Chapman, that he never had any transactions with the Newburg Woollen Company, to which Lawrence made no reply. Cleveland afterwards added, according to the testimony of witness, "that he had not long to live, and wanted us to know about it." The jury were instructed by the judge to disregard this statement, unless Lawrence had authority to act for the plaintiff as to the matter in reference to which it was made. This ruling was sufficiently favorable to the plaintiff.

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Lawrence was a witness for him as to the vital question in the case, namely, whether Cleveland had ever become responsible for these expenses, and had testified that in a certain contingency Cleveland had agreed thus to become responsible. It was competent to contradict him by showing that he had made statements inconsistent with his testimony, and it was also competent to do this by showing that he was silent when statements inconsistent with it had been made in his presence. It was for the jury to determine whether he understood them, had the opportunity to reply to them, could properly have done so, and generally whether he so conducted himself that by his silence he must be deemed to have acquiesced. If this were shown, it would tend to impeach him as to the testimony given in the case, as any acts or declarations of a witness inconsistent with his testimony are always admissible for this purpose. *Commonwealth* v. *Galavan*, 9 Allen, 271. *Brigham* v. *Clark*, 100 Mass. 430. As this evidence was thus admissible, it can have done the plaintiff no harm that the court only permitted it to be considered in case the jury should find that Lawrence had authority to act for the plaintiff. There is nothing in the exceptions to show that any force was given to it on that account against him.

It is not important that this declaration of Cleveland was made after suit brought, for the statement itself could not have been admitted in evidence unless it were acquiesced in, and this acquiescence, whenever made by Lawrence, tended to control his testimony.

The instruction, that according to Lawrence's statement of the agreement the plaintiff could not recover without an attempt to settle by throwing off $400 or $500, was also correct. This was not a matter in avoidance requiring to be specially set forth as the plaintiff contends. The contract as testified to by Lawrence was not an absolute one to pay the expenses, but to pay them if the claim could not be settled by throwing off $400 or $500, and it was a part of the plaintiff's case to show that he had made the attempt before by the contract any obligation was imposed on defendant. While Jackson stated the agreement without this qualification, and the jury or the auditor might have found that Jackson's was the correct statement, as the plaintiff relied also on Lawrence's statement, an instruction was necessary as to what

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would be required of the plaintiff if the contract were found to have been as stated by him.

No sufficient facts are presented to enable us to perceive that the court erred in matter of law in holding that the verdict had been correctly computed, or at least that there had been no error in the computation to the injury of the excepting party.

Exceptions overruled.

LEDYARD A. WATKINS *vs.* PHILIP B. BOWERS.

Bristol. Oct. 28, 1875. — Jan. 7, 1876. MORTON & LORD, JJ., absent.

In an action by the payee against the maker of a promissory note, it appeared that the plaintiff was an agent of a life insurance company. Evidence was admitted for the defence tending to show that the note was given for a policy of insurance in the company upon an agreement with the general agent of the company that the defendant should have sixty days to determine whether he would or would not be insured, and that, if within that time he should decide not to be insured, and should so notify the plaintiff, who was then present, the policy should be taken back and the note returned. *Held*, that this evidence was competent upon the issue whether there was a contract between the parties and a completed delivery of the policy and note under it.

In an action upon a promissory note, given to the plaintiff as the agent of a life insurance company for a policy of insurance under an agreement that, if the defendant should within sixty days notify the plaintiff that he had decided not to be insured, the policy should be taken back and the note returned, evidence was put in by the defendant tending to show that during the sixty days he took the policy to the town where the plaintiff resided and endeavored to find him for the purpose of returning the policy to him. *Held*, that the testimony was competent to rebut any presumption of the defendant's acceptance of the policy arising from his inaction.

CONTRACT upon a promissory note, for $752.30, dated August 10, 1874, made by the defendant, payable to the order of the plaintiff in two months from date.

At the trial in the Superior Court, before *Pitman*, J., the only questions for the jury, under the ruling of the judge were whether any contract was entered into between the parties, and whether there was or not a want or failure of consideration.

The evidence of the defendant, which was admitted against the plaintiff's objection, on the ground that it was an attempt to alter or control a written contract by oral evidence, and for other

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reasons, was in substance as follows: The defendant testified that he had been solicited by the plaintiff, who was an agent of the Phenix Mutual Life Insurance Company of Hartford, to take out a policy on his life; that on August 10, 1874, the plaintiff came to his house and introduced to him G. E. Holloway, the general agent of the company, to whom he said that if he intended to get insured he would see him at Fall River. Watkins or Holloway inquired how long time he wanted to make up his mind to be insured, and he replied that he could not tell, it might be longer or shorter. Holloway then said: "I will do this. It is something I will not allow my agents to do. I will take out an application for a policy, and if it is accepted by the company I will send you a policy, and I will give you sixty days to make up your mind whether you will be insured or not, and if at the end of sixty days you make up your mind not to be insured, you may notify Watkins, and he will come and bring the papers and take the policy, and it shall not cost you a cent." He finally accepted the offer. Holloway placed the note before him and asked him to sign it. He then said he would not sign it. Holloway said it would not be binding unless he decided to keep the policy and be insured. The defendant said, "If I sign this note shall I not be held to pay it?" and Holloway said, "No, this is a conditional transaction; you will not be holden unless you decide to keep the policy and be insured. It will not be binding any way."

He also testified that on these assurances he signed the note; that before that, during the conversation, he had signed, under the circumstances stated, the application for a $10,000 policy from the company, and a physician had examined him and certified thereon; (which application and certificate were produced in court and went in on cross-examination as evidence;) that when he signed the application the plaintiff said it was not binding, but it was necessary for him to sign it or the company would take no notice of it; that the defendant told the plaintiff he should not sign any papers that should be binding on his part; that the plaintiff took the note and application; that as the party were leaving the house Holloway remarked, "I consider you insured for sixty days." The defendant said, "No, I do not consider myself insured until I decide whether I will be or not."

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The defendant further testified that about a week afterwards Watkins called at his house and left the policy there with his wife, the defendant being absent at the time; that on his return the same day he saw it there; that in about two weeks from the time it was left there he saw Watkins in Fall River, and told him he should not keep the policy; that in a few days after that conversation Watkins called at his house, and he told him what the understanding was, that he wanted him to return his papers and he give up the policy. Watkins replied that he knew all about it and should do just as he had agreed to, but wanted him to keep the policy.

The defendant further testified, against the special objection of the plaintiff as to its competency in any view of the case, that he had taken the policy to Fall River previously to his seeing Watkins there, and had endeavored to find Watkins; that he did not know that he had any office or house; that he expected to find him; that he looked around for him on September 26, and on Wednesday, September 30, and tried to find him but could not; that on October 2, he went to Fall River, having the policy with him, and met Watkins on Main Street; that he got out of the carriage to hand him the policy, saying to him, "Here, I have had this policy long enough, take it;" that Watkins waived his hand and said, "Hold on, and I will come up to your house tomorrow and get the policy;" that the next day, Watkins drove into his yard; that he handed Watkins the policy, and he took it from his hand, opened it, and looked at it, and placed it back in the envelope and said he was sorry he did not keep the policy, it would be a great injury to him; that the defendant said: "You know the agreement that you were to take it back if I did not conclude to be insured, and you would give up the note;" that Watkins replied, that he was very sorry he did not keep the policy and be insured; that he would leave the policy there, then, and send to Hartford; that he would then bring his papers and take the policy; but he did not do it, and left the policy still in his, defendant's, possession. The defendant's testimony was corroborated by other witnesses.

The plaintiff contended, and his evidence tended to show, that Holloway told the defendant that he would take his application and send the policy, if accepted by the company; and if at the

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end of sixty days he did not find it was a good investment for his estate, or that the facts in regard to the standing of the company or the form of the policy had not been stated truly, he would return the note and cancel the policy. On other points, as well as on this, the plaintiff's evidence was substantially in direct conflict with that of the defendant. No question was made but that the policy was a good and valid life insurance policy for the sum of $10,000, on the life of the defendant, if there was ever a completed contract.

The plaintiff requested the judge to rule, as a matter of law, that taking all the evidence relied on by the defendant as true, it did not constitute a legal defence to the action. This the judge declined to do, and instructed the jury for the purposes of the trial that there was no evidence of fraud for them to consider, but the sole question for them was as to the consideration; that if the minds of the parties met, and there was a competent contract, so that the policy ever attached or the company became liable, either temporarily or permanently, then there was a consideration, and no defence to this suit; but if, on the other hand, the jury were satisfied that the defendant refused to make any contract, or to be bound in any way, but expressly reserved to himself the right of deciding whether he would be insured, and within the time limited notified the plaintiff that he would not, that there was then no consideration to support the note; that, if they believed the evidence of the defendant and his witnesses, there was a want of consideration, and their verdict should be for the defendant; otherwise, if they believed the plaintiff and his witnesses, their verdict should be for the plaintiff.

The jury found for the defendant; and the plaintiff alleged exceptions.

J. Brown, for the plaintiff.

J. M. Morton, Jr., for the defendant.

COLT, J. It was a question of fact for the jury whether there was a contract between the parties and a completed delivery of the note and policy under it. The rule excluding parol evidence to contradict a written instrument is not infringed by the admission of such evidence, to show that the instrument never had any binding force for want of due delivery, or, if not under seal, for want of consideration; because the evidence is offered not to

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vary the contract, but to prove that no contract was ever made; the inquiry is a preliminary one. *Coddington* v. *Goddard*, 16 Gray, 436. *Faunce* v. *State Mutual Life Assurance Co.* 101 Mass. 279.

In the case at bar the note in suit had no binding force until delivered as evidence of a subsisting debt, and none if made without consideration. The consideration necessary to its validity depended on whether the contract of insurance was so completed between both parties that the policy attached and the company became liable under it temporarily or permanently. There was conflicting evidence on these points, and the judge rightly ruled that, if the minds of the parties met, there was a contract, and a good consideration for the note, but not otherwise. The jury found that there was no completed contract of insurance, and therefore no consideration for the note. The fact that the policy was left at the defendant's house and retained by him would be evidence bearing on the question of its delivery and acceptance, but not conclusive, and all the circumstances are to be considered by the jury. *Blanchard* v. *Blackstone*, 102 Mass. 343.

The testimony of the defendant that he took the policy to Fall River, and endeavored to find the plaintiff, tended to rebut the presumption of acceptance which might be drawn from his inaction, and was rightly admitted. *Bornstein* v. *Lane*, 104 Mass. 214.

It was not contended at the argument that there was any evidence of fraud which ought to have been submitted to the jury.

Exceptions overruled.

ALBERT F. CHACE *vs.* JOHN SHERMAN.

Bristol. Oct. 27, 1875. — Jan. 10, 1876. MORTON & LORD, JJ., absent.

A declaration for slander which alleges, in the form prescribed by the Gen. Sts. c. 129, that the defendant charged the plaintiff with a certain crime "by words spoken of the plaintiff substantially as follows," is supported by proof that the defendant spoke words substantially, though not precisely like those set out in the declaration.

A declaration for slander alleged that the defendant charged the plaintiff with burning his own mill, with the intent to defraud the insurers thereof, "by words spoken

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of the plaintiff substantially as follows: He (meaning the plaintiff) burned it (meaning the said mill) because he was poor and wanted the money." At the trial there was evidence that the defendant charged the plaintiff with burning his own mill "to get his insurance." *Held*, that words were proved "substantially" as alleged, under the Gen. Sts. c. 129. *Held*, also, that the objection that the declaration did not show that the defendant charged the plaintiff with a crime, could be taken only by demurrer.

A declaration for slander alleged that the defendant accused the plaintiff, by certain words, which were set forth, of burning his own building with intent to defraud the insurers thereof. The defendant's answer contained a general denial, and alleged that "there are no sufficient allegations in said plaintiff's writ and declaration of any matter or thing to constitute the substance of slander in form and manner." *Held*, that, if the answer contained a demurrer, it could not first be treated as such in this court.

TORT for slander. The counts relied on at the trial were the first and third. The first count was as follows:

"And the plaintiff says that on the thirteenth day of November, 1873, he was the owner of a certain building, to wit, a saw-mill, at Swansey, in said county, and in use and occupation thereof; that said mill was insured, for the benefit of the plaintiff, against loss or damage by fire; that said mill or building was wholly destroyed by fire on or about the night of said thirteenth day of November; that afterwards the defendant publicly, falsely and maliciously accused the plaintiff of wilfully and maliciously burning the said building or mill, with the intent the insurers thereof to injure and defraud, by words spoken of the plaintiff substantially as follows: 'That damned cuss (meaning the plaintiff) burned his mill;' 'Albert Chace, he burned it, and every one around here thinks so,' 'or nearly every one.' 'He (meaning the plaintiff) burned it (meaning the said mill) because he was poor and wanted the money.'"

The third count was as follows: "And the plaintiff further says, that after said building or mill was consumed, as aforesaid, the defendant publicly, falsely and maliciously accused the plaintiff of wilfully burning said building or mill, insured as aforesaid, and as set out in the first count of the declaration, with intent to defraud the insurers thereof, in words spoken of the plaintiff substantially as follows: 'He (meaning the plaintiff) burned it (meaning said building or mill) because he (meaning the plaintiff) was poor and wanted the money,' thereby meaning the amount said building or mill was insured for."

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The answer contained a general denial, and alleged that "there are no sufficient allegations in said plaintiff's writ and declaration of any matter or thing to constitute the substance of slander in form and manner."

At the trial in the Superior Court, before *Aldrich*, J., the only testimony put in by the plaintiff to prove the speaking of the words alleged was the following:

John A. Davis testified that on the morning after the mill was burned he had a talk with the defendant about the burning of the mill, and the defendant told him "he knew the mill would be burnt, and the mill was burnt, and Albert F. Chace burnt it to get his insurance."

James Baker testified that some time between the middle of November and December 1, 1873, he had a conversation with the defendant about the mill, and the defendant said, "The damned cuss set his mill afire to get his insurance; the damned cuss set it on fire to get his insurance for he had about spent his money."

James Barney testified that on January 1, 1874, he had a conversation with the defendant about the burning of the mill; that he asked the defendant how the mill was burned, and he replied, "That damned cuss burned it;" that he asked what damned cuss? and he said, "Albert Chace, he would have to fail if he didn't;" he also said the "mill was insured." "I said if it was insured he could not get the insurance money," to which the defendant replied, "he would look out about that." The witness also testified that in April of the same year, the defendant told him he would have him (the plaintiff) up for burning his mill and strip him.

The defendant asked the judge to instruct the jury as follows: "The words set out in the declaration must be, if not precisely, yet substantially proved. The evidence therefore must show the charge to have been made substantially as alleged so far even as the words are concerned. It cannot be shown that the same charge was made, but in another form, and in the use of substantially different language; [and there is no testimony in the case upon which the jury would be authorized to find that the words contained in said declaration have been so proved, so far as to constitute slander."]

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The judge gave these instructions except the clause printed in brackets, which he declined to give, and gave other and full instructions, not objected to, upon all other parts of the case. The jury found for the plaintiff; and the defendant alleged exceptions.

J. M. Morton, Jr., for the defendant.

H. K. Braley, for the plaintiff.

DEVENS, J. The instructions requested by the defendant were given, except that there was "no testimony upon which the jury would be authorized to find that the words contained in said declaration have been so proved, so far as to constitute slander," which was refused.

The object of the mode of pleading prescribed by the Gen. Sts. *c.* 129, is to inform the defendant, not only of the nature of the charge alleged to have been made by him, but of the language in which it was uttered; and it would not be competent to prove the same charge made by words substantially different from those set forth. *Baldwin* v. *Soule*, 6 Gray, 321. *Lee* v. *Kane*, 6 Gray, 495. *Doherty* v. *Brown*, 10 Gray, 250. *Payson* v. *Macomber*, 8 Allen, 69. *Clark* v. *Brown*, 116 Mass. 504. It is not, however, necessary to prove that the words were exactly those set forth in the declaration, but only substantially so, in order that it may appear that the crime was charged in the manner in which the plaintiff alleged it to have been charged. *Baldwin* v. *Soule*, *ubi supra*. *Robbins* v. *Fletcher*, 101 Mass. 115.

Upon the proof there must be deemed to have been evidence of the words substantially as the plaintiff alleged them, and sufficient to show that the crime was charged against the plaintiff as he alleged it to have been. *Baldwin* v. *Soule*, *ubi supra*. *Dancaster* v. *Hewson*, 2 Man. & Ry. 176. All the statements proved were accompanied by other statements as to the purpose for which the plaintiff burnt the mill, namely, to get the insurance upon it, which, important as they were in characterizing the charge, were not set out in the declaration; but these latter in no way diminished the effect of the words alleged, but on the contrary tended to show that they were used with the same meaning which the plaintiff sought to attribute to them. There was, therefore, testimony in the case that the words alleged had been used; and that they had been so used as to constitute slander was

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also clear, as all of them had been uttered in connection with a statement that the purpose of the plaintiff had been to obtain payment for his mill, thus burnt, from the insurers.

The defendant contends that it is not actionable to accuse one of burning his own mill, and that so much of the declaration, as charges the plaintiff merely with this, sets forth no actionable slander, and must therefore be rejected. *Bloss* v. *Tobey*, 2 Pick. 320. *Tebbetts* v. *Goding*, 9 Gray, 254. But these words, when used in certain connections, are actionable; and the declaration alleges that, by the use of these words as set forth, the defendant charged the plaintiff with the crime of wilfully burning the mill with intent to defraud the insurers. It is the duty of the plaintiff, indeed, when the words are not in themselves intelligible, in the same sense in which he claims them to have been spoken, to make them so by a concise and clear statement, and by reference to such facts as may be necessary for that purpose, and, if he does not do this, the defendant may demur to the declaration. Gen. Sts. *c.* 129. *Brettun* v. *Anthony*, 103 Mass. 37. *York* v. *Johnson*, 116 Mass. 482. But this rule is for the benefit of the defendant, and if, because he is sufficiently informed of the connection in which the words were used, or of the facts to which they refer, or for any other reason, he neglects to demur, he cannot at the trial object to the insufficiency of the declaration, because it fails to show how or in what connection words, innocent of themselves, were used so as to import the crime which the plaintiff avers to have been charged by them. *Clay* v. *Brigham*, 8 Gray, 161. The question, then, to be passed upon is only whether the defendant used the words, making thereby the charge which the declaration avers that he did.

As argued by the defendant, the question of the legal insufficiency of the facts to constitute a defence or establish a right of action may be raised by a request for a ruling at the trial as fully as if there was a demurrer. *Montague* v. *Boston & Fairhaven Iron Works*, 97 Mass. 502. This, however, is quite a different proposition from that which he seeks to establish, namely, that where sufficient facts are shown to maintain the action he may avoid their effect because they have been defectively set forth. Enough was set forth by the declaration to show a cause of action, unless it were demurred to for its deficiency. *Clay* v. *Brigham*, *ubi supra*.

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The defendant contends that the answer raises the question of sufficiency of the declaration. On examining it we do not find any intelligible demurrer, certainly not one in the form required by Gen. Sts. *c.* 129, § 11. If there were one, however, in every respect formal, it could not be now discussed. There is nothing to show that it was insisted upon at the trial, called to the attention of, or passed upon by, the presiding judge. Had he upon demurrer ruled the declaration sufficient, the defendant might have presented the matter by a proper exception to this court. Had he held the declaration insufficient, the plaintiff could have applied to him for leave to amend, which, on terms which he deemed suitable and just to both parties, he would undoubtedly have granted. *Exceptions overruled.*

ANSON J. BARKER *vs.* CITY OF TAUNTON.

Bristol. Oct. 27, 1875. — Jan. 10, 1876. MORTON & LORD, JJ., absent.

If a city passes an order reducing generally the grade of a street, and afterwards passes another order for the construction of sidewalks in the street, the owner of land adjoining the street, and injured by the change of grade, may, upon a petition under the Gen. Sts. *c.* 44, § 19, filed within one year from the time when the sidewalk in front of his premises was brought to its final grade, recover for all damage done by the change of grade.

Where, at the trial for the assessment of damages sustained by the change of grade in a street, the city introduces evidence that the changes made, including the petitioner's own improvements, had increased by a given sum the value of the premises, it is competent for the petitioner to show how much he has expended in improvements upon the premises since the change of grade.

It is no bar to a petition for the assessment of damages, sustained by the change of grade in a street, that the petitioner was one of the original petitioners for the improvements.

PETITION to the county commissioners for a jury to assess the damages to the petitioner's estate by lowering the grade of Winthrop Street and High Street, in the city of Taunton.

At the trial before a sheriff's jury, it appeared that the petitioner had for many years been the owner of an estate, on which he lived, on the westerly side of Winthrop Street, and that on November 8, 1873, he purchased an adjoining estate on the corner of Winthrop Street and High Street.

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The petition for damages for the change of grade of Winthrop Street was presented to the mayor and aldermen on July 1, 1874.

The petitioner put in three orders passed by the respondent. The first, dated July 5, 1871, was as follows: "Ordered, that the grades shown on the plan herewith, and by measurements corresponding thereto, be adopted and established as the grade of Winthrop Street from Harrison Street easterly so far as covered by said plan. The superintendent of streets is hereby directed to grade the same at an expense not to exceed eight hundred dollars, and the finance committee are hereby authorized to negotiate a temporary loan for the payment of the same."

The second order, dated September 3, 1873, for the construction of a sidewalk on Winthrop Street, was as follows: "Ordered, that the superintendent of streets be instructed to construct a sidewalk on the westerly side of Winthrop Street, from the post-office to the railroad crossing of the Taunton and New Bedford Railroad, with edge-stones, and cover the same with concrete, at an expense not exceeding twenty-four hundred dollars, to be paid from the appropriation for public improvements; and that he be instructed to make a report of the expense of the same to this board, in order that an assessment be made upon the abutters for the construction of said sidewalks."

The third order, dated May 20, 1874, for the construction of a sidewalk on High Street, was as follows: "Ordered, that the superintendent of streets be instructed to construct sidewalks seven feet in width on both sides of High Street, from Winthrop Street to Cohannet Street, with edge-stones, and cover the same with concrete, at an expense not exceeding twenty-two hundred dollars, to be paid from the appropriation for public improvements; and that he be instructed to make report of the expense of the same to the committee on sidewalks, in order that an assessment be made upon the abutters for the construction of said sidewalk."

The petitions for the construction of the sidewalks on Winthrop Street and High Street were signed by the petitioner among others.

It appeared in evidence that under the order of July 5, 1871, the work of grading Winthrop Street, and the sidewalks thereof, was begun in the fall of 1871; that not much was then done ex-

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cept to lower a portion of the street in front of the petitioner's premises; that in the summer and fall of 1872, the remainder of the street in front of the petitioner's premises was cut down to the established grade, and the sidewalks partially brought to the same grade; that in the summer and fall of 1873, the sidewalk in front of the petitioner's premises was finally reduced, under the direction of the superintendent of streets, to the established grade of Winthrop Street, and the curbing set preparatory to being covered with concrete, and a portion of the street several rods below the petitioner's premises was filled in to raise the same to the required grade.

It also appeared that the work upon High Street was commenced soon after the third order was passed, and the work completed during the summer; that, in doing the work, the grade of the street and sidewalk in front of the petitioner's premises was considerably lowered, and the injury to said estate, for which damages were claimed, was caused by such lowering.

The respondent objected to any evidence of damage sustained by the petitioner by the construction of the sidewalks, because he signed the petitions for making the sidewalks; but the objection was overruled, and the evidence admitted.

As the orders numbered two and three for the construction of the sidewalks do not authorize any change of grade, the respondent objected to any evidence tending to show damage to the petitioner by any change of grade of these streets for the purpose of constructing these sidewalks. The objection was overruled, and evidence admitted of all the acts done by the superintendent of streets, and those in his employ, in the construction of these sidewalks.

The petitioner, on his examination in chief, stated what expense he had incurred in consequence of the change of grade, and testified at length and without objection to the details thereof. Several experts, called by the respondent, testified that the change that had been made had increased the value of the petitioner's premises from $500 to $1500, but in making this esti mate they included what had been done by the petitioner as well as the city. The petitioner was then recalled, and asked what he had expended beyond what he had already stated. The respondent objected to the question, because it in effect was asking

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the witness to state what improvements he had made upon this estate. The objection was overruled, and the witness answered $1500 or $1600. On cross-examination, he stated that about $500 of this sum had been expended in repairing the interior of the house, about $500 for painting the exterior of the house, and the remaining $500 or $600 he was unable to account for, further than by saying that he had employed a team a great part of the summer, at $3.50 per day.

The respondent asked that the jury be instructed as follows: "That under this warrant the petitioner cannot recover for the change of grade under the order of July 5, 1871, if the petition of the petitioner was not presented to the mayor and aldermen within one year from the completion of the work under that order." This instruction was refused; but the jury were instructed that the petitioner was entitled to recover for all the damages done to his estate by the change of grade, he having presented his petition to the mayor and aldermen within one year from the time when the sidewalk in front of his premises was brought to its final grade.

The jury returned a verdict for the petitioner. In the Superior Court, the petitioner moved that the verdict be accepted and recorded. *Aldrich*, J., overruled the motion, and ordered the verdict to be set aside; and the petitioner appealed.

E. H. Bennett & H. J. Fuller, for the petitioner.

G. E. Williams, for the respondent.

COLT, J. The petitioner claims damages for the act of the city in reducing the grade of two streets. At the trial before the sheriff's jury, he put in evidence an order passed in July, 1871, establishing the grade of Winthrop Street, followed by an order in September, 1873, for the construction of a sidewalk in that street; and also by an order in May, 1874, for the construction of sidewalks on High Street.

It was in evidence, that, under the order of 1871, work on Winthrop Street was carried on through the year and into the summer and fall of 1872, when the street in front of the petitioner's premises was cut down to the established grade, but the sidewalks were only partially brought to grade. In the summer and fall of 1873, the sidewalks were finally reduced to the established grade of that street. The petitioner is required to file his

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petition for damages within one year from "the completion of the work." Gen. Sts. *c.* 44, § 19. This petition was filed July 1, 1874, and the respondent asked that the jury be instructed that the petitioner could not recover for change of grade under the first order, if the petition was not presented within one year from the completion of the work under that order; but the jury were told that the petitioner, having presented his petition within one year from the time when the sidewalk in front of his premises was brought to its final grade, could recover for all damage done by change of grade.

In view of the real issues presented by the evidence, we cannot see that this instruction is fairly open to the objection that it takes from the jury a question of fact which should have been submitted to them, namely, the question when the work was completed. There was no contradictory evidence as to the time when the work was done. The real question was, whether the year began to run from the completion of the grade of the street proper, that is, the part devoted to carriage travel, or from the completion of the grade of that part devoted to foot travel. There was no dispute but that the petition was presented within a year from the latter time. It would have been erroneous to have ruled that it must be presented within a year from the time when the grade of the carriage way was completed. There is nothing to show that the order of 1871 is limited to the latter, and it is broad enough in terms to cover the whole street. The sidewalks are a part of the street; and it appears that in fact the change of grade in the sidewalk was commenced and partly completed before the order of 1873, for the construction of a sidewalk, was passed. There is nothing in the terms of the last order inconsistent with the order of 1871, or which shows that it was intended to supersede or repeal that order. The first relates only to the grade of the whole street; the last, to the construction of sidewalks with concrete pavement and edge-stones. There is nothing which determines that the work of grading was done under the last order after September, 1873. Under both, the work was done by the superintendent of streets; and it would be unjust to the petitioner now to hold that the grading, so far as it was done after the last order, should be referred only to that, so as to defeat or diminish his claim for damages. The

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respondent was not wronged by the instruction given and the refusal to give the one asked.

The respondent objected that the petitioner should not be allowed to state how much he had expended in improvements upon the premises since the change of grade. And this objection would have been well taken if the cost of such improvements had been claimed as a substantive ground of damage. *Buell* v. *County of Worcester*, *ante*, 372. But here the testimony was competent in reply to the respondent's evidence that the changes made, including the petitioner's own improvements, had increased by a given sum the value of the premises. It was necessary for the jury to know how much of that sum was due to the petitioner's own acts. Being competent for this purpose, it is right to infer that it was submitted to the jury with proper qualifications, or that the objecting party did not care to limit its effect. It must appear affirmatively that such evidence was permitted under objection to be improperly used. *Earle* v. *Earle*, 11 Allen, 1.

It is no bar to the claim for damages made by the petitioner, that he was one of the original petitioners for the improvements. That alone is not evidence of an assent that his property shall be taken for public use without compensation.

It was conceded at the argument that the objection that the city was not liable for the acts of the superintendent of streets was disposed of by the decision in *Thurston* v. *Lynn*, 116 Mass. 544. All other points were waived by the respondent at the argument. *Verdict accepted.*

JOHN N. AMES *vs.* JESSE D. BATES & trustee.
JOSEPH L. FREEMAN & another *vs.* JOHN N. AMES & trustee.

Bristol. Oct. 28, 1875. — Jan. 10, 1876. MORTON & LORD, JJ., absent.

W. purchased of A. a claim against B., pending an action by A. upon the claim. B. had previously purchased a claim against A., and had given notice thereof to A. Suit was brought thereon by B. in the name of the assignor, in which W. appeared as adverse claimant of funds in the hands of B. summoned as trustee. At the time of his purchase of the first claim W. had no knowledge of the claim against A. *Held*, that judgment for the plaintiff in the second action could not be set off against judgment for the plaintiff in the first action.

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TWO ACTIONS OF CONTRACT. In the Superior Court before *Wilkinson*, J., judgment was rendered for the plaintiff in each action, and a motion was made by Bates, the defendant in the first action and equitable owner of the judgment in the second action, that the judgment in the second action be set off *pro tanto* against the judgment in the first. The judge overruled this motion; and Bates alleged exceptions. The facts of the case appear in the opinion.

E. Ames, for Williams.

J. Daggett, for Bates.

DEVENS, J. The equitable owner of the judgment in the first of these actions is Earl S. Williams, who purchased of Ames the claim upon which it is founded, after the commencement by him of the action thereon. This purchase was made subsequently to the purchase by Bates, the defendant in the first action, of the claim of Freeman and another against Ames, which is the foundation of the second judgment, and notice thereof to Ames. Bates purchased this claim after action had been brought by Ames against him, so that it could not have been used in set-off in that action, the statute only permitting demands not negotiable to be so used when a party has become the equitable owner thereof and given notice to the plaintiff before the commencement of his action. Gen. Sts. *c.* 130, § 5. At the time Williams made his purchase he had no knowledge that there was any such claim against Ames as that of Freeman and another. Judgment was recovered in the first action by Williams in the name of Ames against Bates for the sum of $120.18, with costs, and Bates having brought an action in the name of Freeman and another, recovered judgment against Ames in the second suit for the sum of $83.99, and moved in the Superior Court that the latter judgment should be set off *pro tanto* against the former, which motion was refused by the presiding judge.

While there is no express statute authority for setting off judgments where the creditor in one action is the debtor in another, except in a limited number of cases, Gen. Sts. *c.* 126, §§ 2, 3, 5, yet this power has been frequently exercised by courts of law, and rests upon their jurisdiction over suitors in them and their general superintendence of proceedings before them. *Makepeace* v. *Coates*, 8 Mass. 451. *Greene* v. *Hatch*, 12 Mass. 195.

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Such a power is only to be exercised upon careful consideration of all the circumstances of the transactions out of which the judgments arise and in order to protect the just rights of parties.

In the present case the nominal parties to the judgments are not the same, nor is the equitable owner of the judgment recovered in the name of Ames, the defendant in the suit of which Bates is the equitable owner. But even if Ames had continued to be the owner of the judgment recovered in his name, it might well be questioned whether Bates should be permitted to set off against it the judgment recovered by him in the name of Freeman and another, when he could not have set off the claims upon which the judgments were founded. The reason why a party is not permitted by the statute to set off such claims may fairly be presumed to be, that it is not just that one should be encouraged instead of paying his own debt to seek out claims against his creditor in order thus to change the position of parties *pendente lite*, and this reason is equally applicable to judgments which may afterwards be obtained upon such claims.

However this might be as to Ames himself, it is clear that as to the assignee of Ames, Bates should not be allowed to effect this change. When the equitable rights of third parties would be affected by an offset of this character, it is not to be made to the injury of intervening rights honestly acquired. *Greene* v. *Hatch*, *ubi supra*. *Zoghaum* v. *Parker*, 55 N. Y. 120. *Gay* v. *Gay*, 10 Paige, 369. *Ramsey's appeal*, 2 Watts, 228.

When the assignee bought the claim sued by Ames, he took it subject to all legal defences and also to all demands which might properly have been pleaded in offset to or diminution of it, but the right thus acquired should not be defeated either wholly or partially, even if it be assumed that Bates having purchased a claim against his creditor which had no relation to and did not grow out of the claim sued, might have been permitted by leave of the court if he had recovered judgment thereon, to offset it against the judgment recovered by his creditor. The assignee having no knowledge of any such claim, could have contemplated no contingency so remote as this, and to permit the offset would be to disregard his just rights.

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We have not considered whether the motion made by Bates was or was not a matter entirely within the discretion of the Superior Court, and its refusal therefore not properly a subject of exception, as whether this is so or not we are satisfied it was properly refused. *Exceptions overruled.*

JOHN PRESTON *vs.* AMERICAN LINEN COMPANY.

Bristol. Oct. 29, 1875. — Jan. 10, 1876. MORTON & LORD, JJ., absent.

A laborer who has assented to a regulation of his employer providing that "all persons intending to leave are required to give two weeks' notice of such intention to the overseers of their respective rooms, and no person will be considered honorably discharged or entitled to wages then due unless this regulation is complied with," cannot maintain an action to recover for his labor if he has left his work without giving the required notice, although the defendant is not restrained from dismissing the plaintiff without notice.

In an action by a laborer who worked under no express contract, and was engaged for no definite time, to recover for his services to his master, it appeared that the plaintiff had been in the defendant's employ fourteen months, and that he had regularly received his pay in an envelope on which was printed a regulation of the defendant, providing that "all persons intending to leave are required to give two weeks' notice of such intention to the overseers of their respective rooms; and no person will be considered honorably discharged or entitled to wages then due unless this regulation is complied with." It did not appear that the plaintiff knew of this regulation when he commenced the work, but he testified that he read it soon after, and knew of it "about all the time he was in the defendant's employ." *Held*, that it was rightly submitted to the jury as a question of fact whether the plaintiff assented to be bound by the regulation, and that they were rightly permitted to consider the fact that, after knowledge of it, he continued to work as before.

CONTRACT upon an account annexed to recover for services as a weaver, while in the employ of the defendant corporation, from July 6, to August 1, 1874. The answer contained a general denial, set forth, in substance, the notice which appears below, and alleged that if the plaintiff worked for the defendant he left without giving the notice thereby required, and that the money claimed was thereby forfeited.

At the trial in the Superior Court, before *Wilkinson*, J., it appeared in evidence that the defendant corporation, which carried on the business of manufacturing cotton cloth, paid the operatives

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on the third Thursday of each month; that the pay roll was made out up to and including the second Saturday of each month previous to the pay day, so that there would be several days' labor, being that interval, which would remain unpaid on each pay day until the following pay day; that the pay of each operative was put in a small sealed envelope and handed to them; that on the outside of this envelope, plainly to be seen, the following words were printed: "Particular notice. All persons intending to leave are required to give two weeks' notice of such intention to the overseers of their respective rooms; and no person will be considered honorably discharged or entitled to wages then due unless this regulation is complied with. American Linen Company. Walter Paine, 3d, treasurer. Fall River, 1870."

The plaintiff had been in the defendant's employ about fourteen months, when he left in August, 1874, and had regularly received his pay in an envelope as described. The plaintiff, on cross-examination, testified that he had known the rule or regulation in question about all the time he was in the defendant's employ; that he could not tell when his attention was first directed to the printed matter on the back of the envelope; that it might have been soon after he went to work, or might have been later that he read it, but did not pay any particular attention to it; that he could read and write, and understood that he was to give and work a two weeks' notice before he left; that he never expressed any dissent from the rule or regulation in question to any officer or agent of the defendant, and never said or did anything from which it could infer that he did not agree to or assent to said rule, or did not understand the same; that on the first Saturday in August, he went to the second hand of the room where he was working and told him he wished to leave at the close of that day's work, and the second hand told him that if he wanted to leave he must work his notice; that he went in the afternoon again, shortly before the mill stopped, and told the second hand that he wished to leave at the close of that day, and the second hand made the same reply as in the morning; that on both occasions he knew what was meant when told that he must work his notice, and that he could not then get his pay if he left; that he left the defendant's employ at the close of that day's

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work, and did not return to work his notice, or offer at any time so to do, although he was able to do so, and under no disability. On the following pay day he went to the mill for his pay, and the overseer testified that he then told him that he could not get his pay unless he worked his notice, and the plaintiff made no reply thereto. This was denied by the plaintiff.

The plaintiff testified that he understood the printed notice to mean, that if he left without giving and working his two weeks' notice he would not be entitled to his pay on that day, but would be on the following pay day, or two weeks after he left; that if he worked two weeks after notice he would be entitled to his pay on the day of his leaving, but that he did not understand it to mean that he would forfeit his wages. The treasurer of the defendant corporation testified, on cross-examination, that he never knew or heard before of such a construction; he also stated that the rule had been in force about four years, and that there were about one thousand hands employed in the mill. There was no evidence, and it was not contended by the defendant, that the plaintiff's attention was called to this rule, when he entered its employ, by any of its agents. The above was substantially all the testimony in the case.

The defendant contended that upon these facts it had a right to infer that the plaintiff had knowledge of and understood the rule and assented thereto, so that it was a contract binding upon him, and that he forfeited his wages by so leaving. This point was contested by the plaintiff, and he requested the judge to rule and instruct the jury as follows: "1. That merely continuing to work, after receiving and reading the notice on the pay envelope as given, would not authorize the jury to find that the plaintiff thereby promised or agreed to forfeit his wages in case he left without two weeks' notice.

"2. That assent could not be inferred from the fact that he continued in the defendant's employ after reading the notice on the envelope, as he was not thereby required to do or omit to do anything while in its employ, to show his assent.

"3. That upon the facts shown the defendant fails to prove that the contract relied on by it was a mutual one, and therefore it was not binding.

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"4. That a fair interpretation of the notice on the envelope is not that the employee should forfeit his wages by reason of leaving without notice, but that payment may be delayed.

"5. That this regulation or notice as given is not a contract, and it imposes a penalty unequal and uncertain in extent, and therefore cannot be enforced as a contract; that upon a fair interpretation thereof, most favorable for the defendant, leaving without notice would only entitle it to recover by set-off or recoupment such special damage as it can show it has suffered."

The judge refused to rule and instruct the jury as requested, but instructed them, among other things, that if they were satisfied that the plaintiff had knowledge of the rule or requirement, and by his silence, or by his words or acts, he assented to it, or gave the defendant a right to believe that he assented to it, it would be a contract binding upon the plaintiff; and continuing to work in its employ after he knew of the rule would be a circumstance tending to show his assent; but that the jury must look at all the surrounding circumstances to see if such contract was entered into, or the defendant was justified in presuming the assent of the plaintiff to the rule or requirement.

The jury found for the defendant; and the plaintiff alleged exceptions.

J. Brown, for the plaintiff.

J. M. Morton, Jr., for the defendant.

DEVENS, J. The fair interpretation of the regulation which the defendant had made requires us to hold that by the terms of it those employees who intended to leave work must give two weeks' notice of such intention, and that, failing to do so, they would not be entitled to the wages which would otherwise be due them at the next pay day. Such a regulation, if assented to by the plaintiff, would form a part of the contract, and if he violated it by leaving without notice, he could not recover the wages which were then unpaid. The defendant would not be left merely to obtain by action or in recoupment such special damages as it might show it had sustained by the violation of his agreement. *Noon* v. *Salisbury Mills*, 3 Allen, 340. *Hughes* v. *Wamsutta Mills*, 11 Allen, 201. *Potter* v. *Cain*, 117 Mass. 238. It is not quite easy to understand the argument much insisted on by the plaintiff, that as the contract was not mutual, that is, that as it im-

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posed no corresponding obligation upon the defendant to give the plaintiff two weeks' notice before dismissing him, it cannot be sustained. It is competent for either party to give to the other the right to terminate the contract abruptly while he himself agrees only to do so upon notice; and such a contract would be good upon sufficient consideration.

The more important inquiry at the trial was whether the plaintiff ever assented to this regulation. There was no evidence that he knew it at the commencement of his work, but he testified that he read it soon after he went to work, and that he knew of it "about all the time he was in the defendant's employ." The instructions submitted to the jury, as a question of fact, whether the plaintiff assented to the regulation so that it formed a part of the contract, and permitted them to consider, as one circumstance, that after knowledge of it he continued to work as before. Assent may be by acts as well as words, and by silence, where a party is fairly bound to speak, if he dissents, as well as by speech itself. *Commonwealth* v. *Galavan*, 9 Allen, 271. *Brigham* v. *Clark*, 100 Mass. 430. The plaintiff was engaged, so far as the case shows, under no express contract, and for no definite time. When first informed of this regulation, if he had refused to be bound by it, and, if it were insisted on, abandoned his work, it could not have been enforced against him; but the fact, that for fourteen months he continued to work with a full knowledge of it, and without any objection to it, legitimately tended to show an assent to it. *Collins* v. *New England Iron Co.* 115 Mass. 23. Whether the plaintiff assented or not was fairly submitted to the jury. *Exceptions overruled.*

GERARD C. TOBEY & others *vs.* CITY OF TAUNTON.

Bristol. Oct. 29, 1875. — Jan. 10, 1876. MORTON & LORD, JJ., absent.

A deed, in which the land conveyed is bounded upon a private way, estops the grantor and those claiming under him to deny the existence of the way for its entire length, as then actually laid out, or clearly indicated and prescribed.

At the time of a conveyance to A. of land in a city, bounded in the deed by a street, the grantor was the owner of the street. It was then used as a street and its boun

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daries were marked out and defined by rows of trees and fences, which boundaries included a portion of the land afterwards conveyed by the same grantor to B., and situated at the corner of the street. On a petition by B. for the assessment of damages for the taking by the city of a portion of the land conveyed to him, for laying out the street, the jury were instructed, at the request of the city, that if the grantor was the owner of the street at the time of the conveyance to A., and at that time the street was fully defined and marked out by having fences and trees to indicate its width, and that deed was duly recorded, neither the grantor nor any one claiming under him would have a right to obstruct any part of the street as indicated by the fences and trees as they were at the time of the conveyance, and the jury can find for such land only such damages as B. would be entitled to for laying out a street over land over which A. had a right of way. The petitioner requested an instruction to the jury that the declaration in the deed to A. did not impair the right of the petitioner to full damages for all the land embraced in his deed and included in the way laid out. This instruction was also given, with the addition, "but it is for the jury to say what that right is." *Held*, that the instructions were conflicting, and that that given at the request of the petitioner was erroneous. *Held, also*, the deed to A. being upon certain conditions subsequent, that it was for B. to show that that deed had been defeated by breach of condition and entry therefor, and that, if not so shown, it was proper for the jury to consider, upon the question of value, that the land was subject to A.'s right of way.

PETITION by the heirs of Joshua B. Tobey to the county commissioners for a jury to assess damages for the taking of land, on the corner of Main Street and Trescott Street in the City of Taunton, by the respondent, to lay out Trescott Street.

At the trial before a sheriff's jury it appeared that by the laying out of Trescott Street twenty-one and one quarter feet of the petitioners' land on Main Street was taken and about twelve feet on the rear line. The land of the petitioners was conveyed to Joshua B. Tobey by Samuel T. Tisdale on November 1, 1856.

The respondent, for the purpose of showing that the rear portion of the petitioners' land was incumbered by a right of way, put in a deed from Tisdale to the Central Christian Society, dated May 2, 1848, of "a certain lot of land in said Taunton on the westerly side of Trescott Street." The deed then described the land by courses and distances, one of the bounds being "thence with the line of said street eighty feet." Following the description was the following clause: "Reserving one pew in the church which is to be erected by said society on the above named lot to be selected by myself and to be mine free from all taxes and rents, while the society shall have an existence, and whenever said society shall disband, the above described land with the

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improvements thereon, excepting the house above the basement with the furniture and fixtures thereto belonging, shall revert back to the said Tisdale, and his heirs and assigns. Provided said church edifice be completed within one year from the date hereof."

At the time of the above conveyance, Tisdale was the owner of the land which is now Trescott Street, and of the land of the petitioners.

The respondent offered evidence tending to show that at that time also, Trescott Street was used as a street, and that its boundaries were marked out and defined by rows of trees and fences, and that such boundaries included a portion of the land afterwards sold to Tobey, namely, the portion in the rear of the building which was then standing on the land and which was the same building that was there when the street was laid out by the city.

By a plan of the land made after the conveyance by Tisdale to the Central Christian Society, and before the conveyance to Tobey, it appeared that the society's land was distant about five hundred feet from that sold to Tobey. The plan also represented Trescott Street as thirty-one feet wide until it reached the land sold to Tobey, which parcel of land, together with that on the other side of the street, projected into it, thereby narrowing the way to seventeen and a quarter feet, at which width it continued for one hundred and one feet until it reached Main Street.

The respondent asked for the following instruction, which was given: "That if Samuel T. Tisdale was the owner of the land which is now Trescott Street, on May 2, 1848, when he made his deed of a tract of land on the west side of this street to the Central Christian Society, and at that time Trescott Street was fully defined and marked out by having fences and trees to indicate its width, and the deed of the Central Christian Society was duly recorded, then neither Samuel T. Tisdale nor any one claiming under him would have a right to obstruct any part of Trescott Street as indicated by the fences and trees as they existed May 2, 1848, and the jury can find for such land only such damages as the petitioners would be entitled to for laying out a street over land over which the Central Christian Society, their successors and assigns, had a right of way."

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The petitioners asked for the following instruction upon the same subject: "That the declarations in the deed from Samuel T. Tisdale to the Central Christian Society do not impair the right of the petitioners to full damages for all the land embraced in the deed to their ancestor, Joshua B. Tobey, and included in the way laid out." This instruction was also given with the addition, "but it is for the jury to say what that right is."

The jury returned a verdict for the petitioners. In the Superior Court the petitioners moved that the verdict be accepted and recorded. This motion was denied and the verdict set aside; and the petitioners appealed.

W. H. Fox, for the petitioners. 1. The petitioners' land was unincumbered with a right of way. The deed to the Central Christian Society, given in 1848, describes the estate conveyed to it as "on the westerly side of Trescott Street." It does not say how far the street extends, either in length or width; does not refer to any visible boundaries, nor even to any plan of the street. As the respondent claims the facts to be, it could not have been a well-defined street, for if the testimony offered by it was true, the building on the petitioners' land was projecting twenty-one and one fourth feet abruptly into the street. The position of the respondent is that the deed to the society gave the society a right to keep this angular area directly in the rear of this building, and five hundred feet from the society's land, open, if it was within the rows of trees and fences on the day of the conveyance to the society, even though it might not have been of any practical use as a way to and from its land. No decision in this Commonwealth has gone to this extent. In *Parker* v. *Smith*, 17 Mass. 413, and *O'Linda* v. *Lothrop*, 21 Pick. 292, it is held that where one conveys land bounded on a way or street, he is estopped to deny the existence of a way or street coextensive with the land conveyed. This case is precisely like those, except that here the grantor gave a name to the way or street, on which the land was bounded. *Tufts* v. *Charlestown*, 2 Gray, 271, does not extend this rule. The first case, where the court holds that the grantee has a right to have the way kept open beyond the line of his own land, is *Thomas* v. *Poole*, 7 Gray 83, where the land conveyed was bounded upon a way or street staked out, to be opened thirty feet wide, extending from Main

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Street to land of S. In *Farnsworth* v. *Taylor*, 9 Gray, 162, *Rodgers* v. *Parker*, 9 Gray, 445, and *Fox* v. *Union Sugar Refinery*, 109 Mass. 292, the street was delineated upon a plan referred to in the deed and recorded. In *Stetson* v. *Dow*, 16 Gray, 372, there was a covenant in the deed that if an avenue was opened as laid out on a plan it was to be open and free to the abutters. The distinction between these latter cases and the present case is not trifling. When Tobey bought his land in 1856, according to the plan then exhibited, there was nothing to lead him to suspect that the way was not the same in 1848 as the plan then indicated. The records did not show it. No monuments or occupation of the land showed it. Must he look for parol evidence of the position of perishable fences during the twenty-four hours of May 2, 1848? Even if the deed to the Central Christian Society gave it a right of way by implication, beyond the limit of its land, to the outlet of Trescott Street, it would not necessarily follow that the street must all the way be kept of the same width it then had. The right to pass out to Main Street has never been interfered with. The narrowest place has always been against the building of the petitioners, as it has stood since 1848. *Fox* v. *Union Sugar Refinery*, 109 Mass. 292.

2. The sheriff gave the instruction asked for by the respondent, and the instruction given at the request of the petitioners was rendered harmless by the addition made to it by the sheriff, the evident purport of which was to leave to the jury, upon the evidence before them, the extent of the way and its effect in the diminution of damages. If the jury followed all these instructions, as it is to be presumed they did, they must have made an allowance for the incumbrance of a right of way. The instructions taken together amount to this: "1. A right of way existed. 2. It did not depend upon this deed." If the sheriff correctly stated the rights of the parties, the verdict should not be set aside because he erred in stating how those rights were acquired.

3. Any right of way which the society had was by estoppel, not by covenant, express or implied. *Howe* v. *Alger*, 4 Allen, 206. An estoppel can only be availed of by parties or privies. *Braintree* v. *Hingham*, 17 Mass. 432. The city is not a party or privy to this conveyance. In *Tufts* v. *Charlestown*, 2 Gray 271, it seems to have been assumed, without discussion, that the

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city could avail itself of such declarations in the deed; but at that time, and until the case of *Howe* v. *Alger*, 4 Allen, 206, the cases had uniformly spoken of this right of way as one by implied covenant and not merely by estoppel.

4. There was no evidence that the right of way, if one ever existed, had ever been asserted or still existed. *Paine* v. *Woods*, 108 Mass. 160.

5. The conveyance to the Central Christian Society was upon the conditions subsequent that it should build a house within one year and that it should continue to exist and not disband. There was no evidence of either of these facts. The burden of proof was upon the respondent to show that the right of way still existed, or was claimed.

G. E. Williams, for the respondent.

DEVENS, J. The two instructions, given at the request of the respondent and of the petitioners respectively, were important as affecting the value of the land, and are inconsistent with each other. They cannot be reconciled by construing the first as a ruling that a right of way existed, and the second as a ruling that this right did not depend upon the deed of Tisdale to the Central Christian Society, in which case, the petitioners contend that, even if the sheriff erred in the latter instruction, the verdict should not be set aside, as it was an error only in stating how the rights of the society were acquired, and immaterial, inasmuch as the respondent was allowed the benefit of such deduction as should properly have been made on account of the existence of such a right of way. The first instruction, given at the request of the respondent, attributes to the deed made by Tisdale to the Central Christian Society, in connection with the facts shown as to the existence of a street with a visible boundary, the effect of creating a right of way in favor of that society, its successors and assigns, over Trescott Street as it then existed; while the second, given at the request of the petitioners, states that the declarations in the deed "do not impair the right of the petitioners to full damages for all the land embraced in the deed to their ancestor, Joshua B. Tobey, and included in the way laid out." Not only is a different effect given to the deed in the two instructions, but a different rule of damages prescribed for the jury. Nor is the inconsistency rectified by the addition made by

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the presiding officer to the latter instruction, "but it is for the jury to say what that right is." Assuming that he did not thereby leave the jury to judge what the right of the petitioners was under the deed, but only left them to determine its value, (which is the construction most favorable in order to sustain the ruling,) it still left them to determine the value of the right of the petitioners to full damages unimpaired by any declarations in the deed previously made to the Central Christian Society.

Even if the rulings are inconsistent, it is to be decided, however, whether the latter ruling was erroneous, because if this were correct, while that first given was otherwise, the respondent could have no ground of complaint, as any error into which the jury may have fallen by reason of the confusion in the instructions would necessarily have been in its favor, and the petitioners are satisfied with the verdict.

When a grantor conveys land bounding on a street or way, he and his heirs are estopped to deny the existence of such street or way, and the right thus acquired is not only coextensive with the land conveyed, but embraces the entire length of the way as it is then actually laid out or clearly indicated and prescribed. *Stetson* v. *Dow*, 16 Gray, 372, and cases cited. *Fox* v. *Union Sugar Refinery*, 109 Mass. 292, 295. The deed to the Central Christian Society bounded its lot on the westerly side of Trescott Street, the grantor being then the owner of the street, and there was evidence that it was then used as a street, its boundaries marked and defined by rows of trees and fences, and that within them was included a portion of the land afterwards sold to Tobey, and for the taking of which the petitioners now claim damages, namely, the portion in the rear of the building then standing on the land, which same building was there when the street was laid out by the city. It is contended that as this area in the rear of the building could have been of no practical use to the society in going to or from its land, it would have no right to have the area kept open for that purpose, even if it was within the rows of trees and fences defining the street on the day of the conveyance. But the way as marked out by its monuments was in view of the parties; its location may fairly be supposed to have entered into the consideration of the purchase; and the question is not here of how much value this portion of the

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way was as then defined, but whether the right to use it passed by estoppel as against the grantor. That it did so pass, and thereby that a servitude was imposed upon the land afterwards granted to Tobey, who took his land subject to it, is well sustained by the authorities. *Thomas* v. *Poole*, 7 Gray, 83. *Rodgers* v. *Parker*, 9 Gray, 445.

While Tobey did not have notice as clear and effectual as he would have had if a plan had been made and recorded at the time of the deed to the Central Christian Society, instead of a definition of the street by perishable monuments, yet, when he bought in 1856, he had notice by the record that his grantor had in 1848 sold a tract of land bounding on Trescott Street, and it was for him to inquire what that street then was. If he purchased upon the faith of a plan exhibited to him which did not correctly indicate it, such purchase could not deprive the society of its right, or diminish the extent of the street.

Nor, although the right of way which the society had was by estoppel, does the respondent seek to avail itself of it in any such sense as that intended when it is said estoppels can only be availed of by parties or privies. *Howe* v. *Alger*, 4 Allen, 206. *Braintree* v. *Hingham*, 17 Mass. 432. It asserts no rights by virtue of this estoppel, but in determining what it is to pay on account of land taken by it for public purposes, the fact that the land is subject to certain servitudes which diminish its value, is a legitimate ground for deduction.

The respondent undertook to show that this right of way existed by the deed to the Central Christian Society. That deed was of an estate defeasible on certain conditions subsequent. The burden of proof was on the petitioners to prove that such estate had been defeated by breach of condition and entry therefor, and that consequently they were entitled to damages for injury to the entire estate. *Verdict set aside.*

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REUBEN E. LADD *vs.* NEW BEDFORD RAILROAD COMPANY.

Bristol. Oct. 29, 1875. — Jan. 28, 1876. MORTON & LORD, JJ., absent.

A railroad corporation is not liable to a road master in its employ for an injury sustained by him while riding in one of its cars, which is thrown down a bank by the breaking of a switch on its road, in the absence of evidence that there was any negligence in procuring a proper switch, or any defect in the switch which could have been discovered upon the most careful inspection, or that the switch was intended, or could reasonably have been expected, to hold the cars upon the tracks, which were driven at unreasonable speed, or of other evidence of negligence for which the corporation would be liable.

A railroad corporation is not liable to an employee for an injury sustained by him while riding in one of its cars, which is thrown from the track, on the ground that the cars were imperfect by the want of check-chains, if he was of the opinion that cars without check-chains were dangerous, and knew that some of the defendant's cars were not provided with check-chains, and did not notice, until after the accident, whether the car in which he was riding had check-chains or not.

TORT by a road master, in the employ of the defendant corporation, to recover for an injury sustained by him in consequence of the defendant's cars, in one of which he was riding, being thrown down a bank by the breaking of a switch on the defendant road.

At the trial in the Superior Court, *Wilkinson*, J., ruled that the evidence would not warrant a verdict for the plaintiff, and directed a verdict for the defendant; and the plaintiff alleged exceptions, the substance of which appears in the opinion.

E. H. Bennett & W. H. Fox, for the plaintiff.

G. A. Torrey, for the defendant.

GRAY, C. J. The original declaration alleged that the accident was caused by the defendant's negligent employment of an incompetent switchman and an incompetent engineer, and by the incompetency and negligence of the switchman and the engineer. But there was no evidence at the trial that the corporation negligently employed incompetent servants; and it was admitted at the argument that the switchman and the engineer were fellow-servants of the plaintiff, for whose negligence the corporation was not liable to him. *Gilman* v. *Eastern Railroad*, 10 Allen, 233.

The plaintiff now relies upon the amended declaration, which alleges that the injury was caused by the negligence of the cor-

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poration: 1st, in not having a proper switch at this place; 2d, in the imperfection of its cars by the want of proper check-chains.

1. The corporation was doubtless obliged to use the utmost care consistent with the nature and extent of its business, in providing a proper switch; but it was not responsible for hidden defects, which could not have been discovered by the most careful inspection. *Ingalls* v. *Bills*, 9 Met. 1. *King* v. *Boston & Worcester Railroad*, 9 Cush. 112. *Simmons* v. *New Bedford, Vineyard & Nantucket Steamboat Co.* 97 Mass. 361. *Ford* v. *Fitchburg Railroad*, 110 Mass. 240. *Readhead* v. *Midland Railway*, L. R. 2 Q. B. 412, and L. R. 4 Q. B. 379.

There was no evidence at the trial that there was any negligence in procuring a proper switch; or any defect in the switch which could have been discovered upon the most careful inspection; or that any accident would have happened by reason of the condition of the switch, if there had been no negligence on the part of the engineer in passing over it at an unreasonable rate of speed; or that the switch was intended, or could reasonably have been expected, to hold cars upon the track which were driven at unreasonable speed.

There was therefore no evidence which would have warranted the jury in finding that the defendant was liable by reason of a defect in the switch. *Duffy* v. *Upton*, 113 Mass. 544.

2. Upon the question whether check-chains were a usual and proper precaution to be taken by the defendant, the evidence was conflicting. But the plaintiff's own testimony showed that for a long time he had been in the employ of the defendant corporation, and had been of opinion that to run trains of cars without check-chains was not safe for passengers; that he knew that some of the defendant's cars were not provided with check-chains; and that he did not notice, when he took this car, nor until after the accident, whether it had check-chains or not.

Every corporation has the right to carry on a business which is dangerous, either in itself or in the manner of conducting it, if it is not unlawful, and interferes with no rights of others; and is not liable to one of its servants, who is capable of contracting for himself, and knows the danger attending the business in the manner in which it is conducted, for an injury resulting therefrom. *Priestly* v. *Fowler*, 3 M. & W. 1. *Skipp* v. *Eastern Coun-*

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ties Railway, 9 Exch. 223. *Seymour* v. *Maddox*, 16 Q. B. 326. *Coombs* v. *New Bedford Cordage Co.* 102 Mass. 572, 585. *Sullivan* v. *India Manuf. Co.* 113 Mass. 396. *Dillon* v. *Union Pacific Railroad*, 3 Dillon, 319.

This is not like a case in which the premises or instruments upon or by means of which the business is carried on, are temporarily defective, in which case the master may be liable, especially if he has promised the servant to repair them, and has failed to do so. *Snow* v. *Housatonic Railroad*, 8 Allen, 441. *Huddleston* v. *Lowell Machine Shop*, 106 Mass. 282. *Holmes* v. *Clarke*, 6 H. & N. 349, and 7 H. & N. 937. *Holmes* v. *Worthington*, 2 F. & F. 533. *Patterson* v. *Pittsburg & Connellsville Railroad*, 76 Penn. St. 389.

As to the case of *Britton* v. *Great Western Cotton Co.* L. R. 7 Ex. 130, cited for the plaintiff, it may be observed: 1st. The defendant in that case was under absolute obligation by statute to do what it had failed to do. 2d. The jury found that the plaintiff did not know of the risk which he assumed. 3d. The decision can hardly be reconciled with several previously made by the same court. *Dynen* v. *Leach*, 26 L. J. (N. S.) Ex. 221. *Assop* v. *Yates*, 2 H. & N. 768. *Griffiths* v. *Gidlow*, 3 H. & N. 648.

In the case at bar, any risk arising from the want of check-chains was one incident to the plaintiff's employment, and knowingly assumed by him, and for which, therefore, he can maintain no action against the corporation. *Exceptions overruled.*

THOMAS G. HAYNES *vs.* BENJAMIN G. BOARDMAN.

Essex. Nov. 4, 1875. — Jan. 8, 1876. MORTON & LORD, JJ., absent. ENDICOTT, J., did not sit.

There is sufficient privity of estate between a testator, a person to whom he has devised land for life and the remainderman under his will, to establish a title by adverse possession, if the possession by the testator and his devisees is continuous for twenty years.

The mere payment of rent or admission of title by a tenant, without the knowledge of his landlord, will not operate to interrupt an otherwise continuous adverse possession by the landlord.

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WRIT OF ENTRY, dated November 12, 1870, to recover a parcel of land in Haverhill. Plea, *nul disseisin*. At the trial in the Superior Court, before *Allen*, J., the jury found for the demandant; and the tenant alleged exceptions, the substance of which appears in the opinion.

J. W. Perry & L. S. Tuckerman, for the tenant.

S. B. Ives, Jr., for the demandant.

COLT, J. There was evidence tending to show adverse possession of the demanded premises, commencing with the occupation of Mrs. Atwood in 1832, and continued until her death in 1847. She devised all her real estate to Susanna Gage for her life, remainder in fee to the demandant. The possession was continued in Susanna until her death in 1863, and by the demandant until shortly before the commencement of this action. The principal question is whether there was that privity of estate between the testatrix and her devisees which is required to establish title by continuous adverse possession.

It is settled that the disseisin of an heir, devisee or grantee may be tacked to that of an ancestor, devisor or grantor, to create title by adverse possession. *Leonard* v. *Leonard*, 7 Allen, 277. *Melvin* v. *Proprietors of Locks & Canals*, 5 Met. 15, 32. Such adverse possession, continued for twenty years, affords a conclusive presumption of grant to the first occupant.

It is claimed that there is no such privity between the life tenant and the remainderman, because the latter in no sense claims under the former. But the answer is, that both claim under the same will by one title. The disseisin, which was commenced by the testatrix, is continued by each in accordance with that title, and is referred by each only to the entry of the testatrix. There has been no loss of possession; no restoration of the seisin to the true owner; no new entry. The disseisin which commenced with the testatrix has been continuous in her devisees, and establishes her title by lapse of time. It is plainly distinguished from a case of successive entries and new disseisins by different and independent parties.

It does not follow, because no act of the life tenant in disparagement of his title, and no disseisin of him, will be permitted to injure the remainderman, that an adverse possession maintained by the tenant, under his title, will not enure to the benefit

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of the former. The test of title is that there has been no interruption of possession, and no new entry required. If the possession ends before the expiration of the time required to establish the presumption, the seisin of the true owner is restored, and he comes in by right, and not by disseisin, as against all parties.

The other question relates to the effect to be given to the alleged payment of rent to the owner made by tenants of the demandant, and those in privity with him, in occupation of the demanded premises. There was evidence that some of the acts of those who occupied under the testatrix and life tenant were permissive, and the jury were told that the demandant could not have the benefit of such acts, unless they were satisfied that they were under the authority or direction of Atwood or Gage. Full instruction was also given as to what constituted adverse possession. And it cannot be stated as matter of law that the payment of rent, or an admission of title, by a tenant of the demandant or his grantor, without the knowledge of his landlord, would alone operate to interrupt an otherwise continuous adverse occupation. *Exceptions overruled.*

George W. Ela *vs.* Selina Cockshott.

Essex. November 4, 1875. Wells & Morton, JJ., absent.
January 21. — 22, 1876. Colt & Devens, JJ., absent.

Where a petition to establish the truth of exceptions is referred to a commissioner to hear the parties and report the facts, and there is a conflict of testimony, or controversy as to the inferences of fact to be drawn from the evidence, it is the right of either party to have the judgment of the full court thereon, and a motion to recommit the report to the commissioner to report the evidence upon which his findings were based will be granted.

A bill of exceptions tendered stated that requests for instructions were presented to the judge by the petitioner's counsel before the arguments; that the judge refused to receive or read them; that he accompanied his refusal with the statement that if the counsel was not satisfied with his instructions to the jury, he could except to them; and that at the close of the charge the judge asked the counsel to state briefly the substance of his requests, and the counsel then read the requests. The evidence reported by the commissioner, to whom a petition to establish the truth

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of the exceptions was referred, showed that no requests for instructions were presented to the judge until after the arguments and just before the charge; that the judge did not refuse to receive the requests for instructions before the arguments; that when he refused to read the requests just before the charge, he informed the counsel that at the close of the charge he could call the judge's attention to any point not covered by it; that after the charge he again asked the counsel to call his attention to any point in the instructions to which he objected; and that the counsel, instead of doing so, insisted on reading in full his request for instructions. *Held*, that the exceptions were rightly disallowed.

PETITION to establish the truth of exceptions alleged by the petitioner in an action brought against him by the respondent, and disallowed by *Wilkinson*, J., who presided at the trial in the Superior Court.

The petition was referred by this court to a commissioner "to hear the parties and report the facts." His report was duly returned to this court, and the respondent then moved that the report be recommitted to the commissioner to report the evidence upon which his findings were based.

S. B. Ives, Jr., for the respondent.

C. G. Saunders, for the petitioner.

GRAY, C. J. The jurisdiction over petitions to establish the truth of exceptions disallowed by a judge of the Superior Court or of this court, like that over exceptions which have been allowed, is exclusively in the full bench of this court. Gen. Sts. c. 115, § 11. *Priest* v. *Groton*, 103 Mass. 530. *Cullen* v. *Sears*, 112 Mass. 299.

As a matter of convenience, the court has adopted the practice of referring the petition in the first instance to a commissioner to report the facts, and his report of the facts found by him is ordinarily sufficient to present to the full court every question which either party desires to argue. But if at the hearing before the commissioner there is a conflict of testimony, or a controversy as to inferences of fact to be drawn from the evidence, it is the right of either party to have the judgment of the full court thereon. To hold otherwise would be to allow greater weight to the finding of a subordinate officer of the court than to the official certificate of the judge to whom the exceptions were originally presented *Motion granted.*

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The commissioner then made a report of the evidence, and the case was argued upon the petition and his report in January 1876, and is stated in the opinion.

J. A. Loring, (*C. G. Saunders* with him,) for the petitioner.

S. Lincoln, Jr., for the respondent, was not called upon.

GRAY, C. J. The bill of exceptions tendered states that the requests for instructions were presented to the court by the defendant's counsel before the arguments; that the judge then refused to receive or read them; that he accompanied his refusal with the statement, that if the counsel was not satisfied with his instructions to the jury, he could except to them; and that at the close of the charge the judge asked the counsel to state briefly the substance of his requests, and the counsel then read the requests. It omits to state that the judge, both before and after the charge, requested that the counsel would point out to him any omission or defect in the charge, and that the counsel did not comply with this request.

The evidence reported by the commissioner shows that no requests for instructions were presented to the court until after the arguments and just before the charge; that the judge did not refuse to receive requests for instructions before the arguments; that when he refused to read the requests just before the charge, he informed the counsel that at the close of the charge he could call the judge's attention to any point not covered by it; and that after the charge he again asked the counsel to call his attention to any point in the instructions to which he objected, and that the counsel, instead of doing so, insisted on reading in full his requests for instructions.

These differences are important. Before the argument, it was the right of the defendant by his counsel to present requests for instructions, and to have them examined by the judge and passed upon at some time before the jury retired. After the arguments were concluded, the counsel had no right to address the court or the jury, upon the law or the facts of the case, except by leave of the presiding judge. The bill of exceptions as tendered represents the judge as arbitrarily denying to the party a right to which he was entitled. The evidence before us shows that the judge refused no right, but properly declined to surrender the conduct of the cause to the counsel. The judge could not, con-

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sistently with truth or with his official duty, have allowed the exceptions which were presented to him. Those exceptions having been rightfully disallowed, the petitioner is not entitled to be heard upon the questions of law stated therein. *Crow* v. *Stowe*, 113 Mass. 153. *Sawyer* v. *Yale Iron Works*, 116 Mass. 424.

Petition dismissed.

CHARLES HODGKINS, administrator, *vs.* EASTERN RAILROAD COMPANY.

Essex. Nov. 4, 1875. — Jan. 28, 1876. MORTON & LORD, JJ., absent. ENDICOTT, J., did not sit.

A brakeman in the employ of a railroad corporation cannot maintain an action against the corporation for personal injuries, caused by the making up of a train of cars, with platforms of unequal height, by the ordinary servants of the corporation, under the direction of one of its station masters.

TORT to recover for personal injuries sustained by the plaintiff's intestate while employed as a brakeman by the defendant corporation. At the trial in this court, *Ames*, J., withdrew the case from the jury, and reported it for the consideration of the full court, in substance as follows:

At the opening of the case to the jury, the counsel for the plaintiff stated that on the day of the accident a train of passenger cars, including a smoking and baggage car, was made up at the passenger station of the defendant in Boston, by its ordinary servants, under the general direction of its station agent in Boston, who has charge of the making up of trains, to be run over the railroad to Rockport, and the plaintiff's intestate was placed upon this train to act as brakeman; that the train was made up of cars having platforms of unequal height; that a train so made up was unsafe and dangerous, especially for brakemen, and was well known to be so by the officers and managers of the defendant; that a due regard for the safety of its servants, and especially of brakemen, required of the defendant that it should run no cars in the same train having platforms of unequal height, and that it was negligence on its part to run such trains or allow them to be made up.

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It was admitted that the cars composing the train in question were properly made, complete and suitable in themselves both with reference to their platforms and in other respects, and that the plaintiff's intestate was assigned to serve as brakeman upon this train by the station agent in Boston.

The counsel for the plaintiff farther stated, that, upon the arrival of the train at Rockport, it was left in charge of the train men (not including the conductor) for the purpose of making up the train in reverse order of cars, as was necessary preparatory to returning to Boston the next morning. For this purpose two of the passenger cars were set off upon a siding, and the remainder of the train, consisting of baggage and smoking cars, was withdrawn to be sent forward again upon the main track, passing by the cars upon the siding. After the former cars had acquired considerable headway in moving forward upon the main track, it was discovered by the switchman at the siding that the cars first set off had not been pushed sufficiently far upon the siding to clear the main track, and that a corner of one of them projected so far over the main track as to prevent the remainder of the train passing them without collision. The switchman accordingly set the switch in such manner as to direct the remainder of the train back upon the siding, full upon the two cars standing upon it. The course adopted by the switchman was admitted to be the most prudent open to him under the circumstances, after he discovered that the cars could not pass each other upon different tracks.

The plaintiff's counsel farther stated that the said intestate was riding upon the platform of that car which was in front as the cars were moving, and that this came into violent collision with the stationary cars upon the siding. The platforms of the cars thus meeting being of unequal height, the platform of one was forced over that of the other, and the plaintiff's intestate standing at the brake received the injuries for which the action was brought.

The plaintiff contended that the injuries were received by reason of the train having been made up with cars having platforms of unequal height; that if it had been made up with cars having platforms of equal height no damage would have been done to said intestate, and that his injuries did not result from

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his want of care or negligence, or that of any person having the care and management of the train.

If upon the evidence above set forth the plaintiff could maintain his action, the case was to stand for trial; otherwise judgment to be entered for the defendant.

C. G. Saunders, (*C. Saunders* with him,) for the plaintiff.

S. B. Ives, Jr. & *S. Lincoln, Jr.*, for the defendant, were not called upon.

GRAY, C. J. The making up of the train of cars with platforms of unequal height was the act of fellow servants of the plaintiff, for which, by the well settled law of this Commonwealth, he can maintain no action against the corporation. *Farwell* v. *Boston & Worcester Railroad*, 4 Met. 49. *Hayes* v. *Western Railroad*, 3 Cush. 270. *Albro* v. *Agawam Canal*, 6 Cush. 75. *Gillshannon* v. *Stony Brook Railroad*, 10 Cush. 228. *Seaver* v. *Boston & Maine Railroad*, 14 Gray, 466. *Gilman* v. *Eastern Railroad*, 10 Allen, 233. *Johnson* v. *Boston*, 118 Mass. 114.

Judgment for the defendant.

NATHANIEL J. HOLDEN *vs.* DAVID BLANEY & others.

Essex. Nov. 6, 1875. — Jan. 29, 1876. COLT, MORTON & LORD, JJ., absent.

A testator by his will provided that the residue of his estate should be divided into equal shares, and that one portion should be paid to each of his surviving children and that the shares to be paid to his married daughters should be paid to them free from the control of their husbands, and that the daughters should alone have the right to use their respective shares. A codicil to the will directed that the share of one of the daughters should "be held in trust" by the executors, and provided that "they are hereby directed to pay over to her, my said daughter, from time to time, a sufficiency for her comfortable support and maintenance during the term of her natural life, excepting only, that in case she shall survive her said husband, all the remaining portion of her share of my estate shall then be paid over to her in full. My object in thus limiting the payment of my said daughter's share of my estate during the lifetime of her said husband, is to prevent his having any share or benefit of or from my estate." The daughter died after the testator, and in the lifetime of her husband, leaving a will by which she bequeathed her share of her father's estate. *Held*, that she had a vested interest in fee in her father's estate; that the time of payment to her was only postponed by the codicil; and that her executor was entitled to said share.

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BILL IN EQUITY by the executor of Mary B. Sawyer against the executors of Jason Chamberlain, alleging the following facts:

The will of Jason Chamberlain, dated February 24, 1871, after making certain specific bequests, provided as follows:

"Fourth. All the rest and residue of my estate remaining after satisfying the foregoing bequests, of every name and nature, that I shall die seised of and possessed, or to which I shall be in any way entitled at the time of my decease, wherever and however the same may be situated, I do give, devise and bequeath the same in six equal shares and portions, to wit: one share to each of my five surviving children, namely, Ellen Blaney, wife of David Blaney, Mary B. Sawyer, wife of Luther D. Sawyer, Jason Chamberlain, Junior, Sylvester S. Chamberlain and George Chamberlain, and the remaining one equal share equally to and among my four grandchildren who are the children and legal representatives of my late daughter, Ann S. Huntoon, and Frederick W. L. Huntoon, both now deceased, to have and to hold the same in five equal shares and portions to them my said five named surviving children, and the remaining one equal share equally to and among my said four grandchildren and to their respective heirs and assigns forever. But I do order and direct that the equal shares and portions of my estate herein bequeathed to my said married daughters, Ellen Blaney and Mary B. Sawyer, respectively, shall be for their own sole and separate use and control, and subject to no right or control of their respective husbands, and they my said daughters, and they only, shall have the right to use and dispose of their respective portions herein bequeathed to them."

On December 16, 1871, Chamberlain made a codicil to his will, the material parts of which are as follows:

"I, Jason Chamberlain, the testator of the foregoing will, do hereby make this present codicil, which I do order and direct shall be taken as a part of my said foregoing last will and testament, which will, in all respects, excepting wherein it is altered or changed by this codicil, I do hereby republish and affirm.

"First. I do hereby order and direct that the share or part of my estate bequeathed in the fourth item of my said foregoing will to my daughter Mary B. Sawyer, wife of Luther D. Sawyer, shall be held in trust by my executors and trustees, and they are

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hereby directed to pay over to her, my said daughter, from time to time, a sufficiency for her comfortable support and maintenance during the term of her natural life, excepting only that in case she shall survive her said husband, all the remaining portion of her share of my estate shall then be paid over to her in full. My object in thus limiting the payment of my said daughter's share of my estate, during the lifetime of her said husband, is to prevent his having any share or benefit of or from my estate, because I consider that he does not treat my said daughter as a kind and dutiful husband should and would treat a dutiful wife."

Chamberlain died on October 13, 1872, and his will and codicil were duly admitted to probate. On May 10, 1874, Mary B. Sawyer died, leaving a will, in which the plaintiff was named as executor, and disposing of all her estate. Her husband survived her.

The prayer of the bill was that the defendants should pay to the plaintiff Mary B. Sawyer's share of her father's estate.

The defendants demurred for want of equity; and the case was reserved by *Devens*, J., on the bill and demurrer, for the consideration of the full court.

B. F. Thomas, for the defendants. 1. If the bequest had remained as under the will, Mary B. Sawyer might, by a last will and testament, have devised one half of the amount given to her, without the assent of her husband, to third parties; and might have devised the whole to him. If she had died intestate, her husband would have taken the whole under the statute of distributions. Gen. Sts. *c.* 108, §§ 1, 9. To prevent these results, or any of them, the codicil was made, the testator's intent and purpose being that his daughter's husband should not have any share of, or benefit from, his estate. This purpose, manifested in the will itself, is the chief end and aim of the codicil. Seeing that the will failed to accomplish this purpose, the testator made the codicil by which he devised one sixth part of the residue, given to Mary B. Sawyer by the will, to trustees, with directions to pay out of the income (and it would seem of the principal) sufficient for her comfortable support and maintenance during life; and in the contingency of her surviving her husband, the "remaining" portion to be paid to her in full; that is to say, he gave to Mary B. an equitable life estate, capable of being en-

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larged in the contingency (which has not happened), to wit, that she survived her husband, and when the peril from which he was seeking to guard her would no longer exist. *Stevens* v. *Winship*, 1 Pick. 318. *Palmer* v. *Stevens*, 15 Gray, 343. *Andrews* v. *Bank of Cape Ann*, 8 Allen, 313. *Larned* v. *Bridge*, 17 Pick. 339. *Barrus* v. *Kirkland*, 8 Gray, 512.

A construction of the codicil which gives to the daughter the power of devising the estate utterly defeats the object and purpose of the testator; because she might devise the whole to her husband, or, if she died intestate, he would take the whole; or, in a third contingency, if she made a will, giving the property to others, he might claim one half.

2. There is a narrower view of the will and codicil which is fatal to the bill, and that is, no portion of the principal of the trust fund is to be paid over during the lifetime of the husband, and he is still alive. No power of appointment is given to the daughter by the will or codicil in terms or by implication. Such power, if it were possible to infer it from the will and codicil, would be equally in conflict with the obvious intent and purpose of the testator.

To effect the object and purpose and plain intent of the testator, the payment over of any part of the principal cannot take place till the death of the husband of Mary B. Sawyer. To give effect to the purpose and intent of the testator, as well as to the presumption of law that the testator means to have no property undevised, the remainder after Mary B. Sawyer's life estate may be held to fall into the residue and pass to the residuary legatees other than Mary B. *Thayer* v. *Wellington*, 9 Allen, 283, 297, 298, and cases cited.

J. A. Gillis, for the plaintiff.

ENDICOTT, J. The question in this case is whether the share of Mary B. Sawyer goes to her executor, or falls into the residue of Jason Chamberlain's estate as intestate property, to be distributed among all his residuary legatees.

In deciding this question, the intent of the testator is to be gathered, not only from the codicil, but from the provisions of the will, so far as those provisions are not altered by the codicil. For it is an established rule of construction that the codicil shall change the will only so far as the intent is manifest; and the

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provisions of the will are not to be disturbed further than is necessary to give effect to the codicil. *Quincy* v. *Rogers*, 9 Cush. 291, 295. 1 Jarman on Wills, 160.

By the will, it is clear that Mrs. Sawyer was to take a vested interest in one share absolutely on the death of the testator, and that he intended by his will to dispose of his whole estate. And, in our opinion, it is equally clear that the testator did not intend by the codicil to alter the provision vesting one share of the residue in Mrs. Sawyer, but only to postpone the time of payment. This is evident from a careful examination of the language of the codicil. There is no devise over showing that the testator intended to change the will in this respect. The share is not devised in terms to trustees, but only that it shall be held in trust, and no other trust is named except to provide for her support; and the share thus to be held in trust is referred to and described as the share bequeathed in the will. The trustees are not limited to the income in providing for her support, but they are to pay her "a sufficiency for her comfortable support and maintenance" during her life. This indicates, in the absence of a devise over, an immediate beneficial interest, and a postponement only of the time of payment. *Eldridge* v. *Eldridge*, 9 Cush. 516. *Fuller* v. *Winthrop*, 3 Allen, 51, 60. In all the cases cited by the defendants to show that a right to expend the principal by a tenant for life does not enlarge the gift and make it a legacy, there is a devise over on the death of the party having the beneficial interest during life. In the event of the death of her husband, "all the remaining portion of her share of my estate shall then be paid over to her," as if the property was hers, although for a certain time to be held by trustees. In stating the purpose of the codicil, he uses the words, "thus limiting the payment in full during the lifetime of the husband," implying postponement only of the time of payment.

Nor can we give the construction to the last clause for which the defendants contend, that the testator intended under all circumstances to prevent the husband from having any benefit in his estate, and, therefore, that it must be inferred that he did not intend the share should vest in her, but that it should remain intestate property. The effect of this construction would be to control the evident intent of the testator in his will to dispose of all his property.

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The words "my purpose in thus limiting the payment of my said daughter's share of my estate during the lifetime of her said husband, is to prevent," &c., must be taken to refer to the preceding clause, clearly indicated by the use of the word "thus," and to apply to the provisions that are there made. Those provisions refer only to her maintenance during life, and the payment of the residue to her, if she survives her husband. In other words, it was the intention, as expressed, to prevent the husband from having any benefit in the estate during the lifetime of the wife. *Decree for the plaintiff.*

JAMES P. RAY & others *vs.* EDWIN D. WIGHT & another, & trustees.

Suffolk. Nov. 10, 1875.—Jan. 10, 1876. ENDICOTT & LORD, JJ., absent.

Under the bankrupt act, U. S. St. of 1867, c. 176, § 21; U. S. Rev. Sts. § 5106, a plaintiff having a valid attachment upon the property of a defendant, who, pending the action, but not within four months after the attachment was made, has instituted proceedings in bankruptcy, is not entitled to a special judgment, to be enforced only against the attached property, until the question of the debtor's discharge is determined, if there is no unreasonable delay on the part of the defendant in endeavoring to obtain his discharge.

CONTRACT against the acceptors of a draft for $2500, made by the Waterville Manufacturing Company, payable four months after date, and dated September 3, 1873. Writ dated January 20, 1874, and served on the trustees on the same day. The trustees admitted funds of the defendants in their hands to the amount of $1164, and they were in December, 1874, charged as trustees. The defendants appeared and filed an answer, alleging that they had been on November 7, 1875, adjudicated bankrupts, and that sufficient time had not elapsed for them to obtain their discharge, and praying that this suit should be stayed to await the determination of the court in bankruptcy, on the question of their discharge.

At the trial in the Superior Court, before *Putnam*, J., without a jury, it appeared that the defendants had been adjudicated

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bankrupts, as alleged in their answer; and it was admitted that sufficient time had not elapsed in the proceedings in bankruptcy for them to obtain their discharge, and that there had been no unreasonable delay on their part in endeavoring to obtain it. It was also admitted that the plaintiffs' debt was under the bankrupt act provable in the proceedings in bankruptcy. The defendants contended that this suit should be stayed to await the determination of the court of bankruptcy on the question of their discharge, as provided in the bankrupt act, and filed a motion to that effect; but the judge refused to stay the same, and ordered judgment for the plaintiffs for the whole amount of the acceptance, "such judgment only to be enforced against the property attached on the writ in the hands of the trustees, but not to be enforced against the person of the defendants, or either of them, or any other property." The defendants alleged exceptions.

C. T. Russell, for the defendants.

R. Stone, Jr., for the plaintiffs.

GRAY, C. J. A creditor who has brought his action more than four months before the commencement of the proceedings in bankruptcy, and has made an attachment which is not dissolved by such proceedings, may doubtless, after the question of the bankrupt's discharge has been determined by the United States court, have a special judgment against the property attached, even if a certificate of discharge has been granted to the bankrupt. *Davenport* v. *Tilton*, 10 Met. 320. *Bates* v. *Tappan*, 99 Mass. 376. *Stockwell* v. *Silloway*, 113 Mass. 382. *Johnson* v. *Collins*, 116 Mass. 392. *Peck* v. *Jenness*, 7 How. 612. *Doe* v. *Childress*, 21 Wall. 642, 646.

But the bankrupt act expressly provides that "no creditor whose debt is provable under this act shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined; and any such suit or proceedings shall upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge," unless in case of unreasonable delay on the part of the bankrupt in endeavoring to obtain his certificate, or of proceeding, for the purpose of ascertaining the amount due, to a

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merely formal judgment, upon which no execution can issue. U. S. St. 1867, *c.* 176, § 21. U. S. Rev. Sts. § 5106.

The object of this provision is not only to protect the bankrupt, in case he obtains his certificate, from having the original cause of action against him merged in a judgment, the right of action upon which would not be barred by the discharge; *Bradford* v. *Rice*, 102 Mass. 472; but to prevent his being harassed by suits until the question of discharge is determined, and therefore extends to all cases, without regard to the question whether the debt would or would not be barred thereby; *In re Rosenberg* 3 Bened. 14; *In re Ghirardelli*, 1 Sawyer, 343; and also to enable the assignee, to whom all the rights of the bankrupt in the property have passed, subject to the attachment, to come in, if he elects so to do, and assume the defence of the action. U. S. St. 1867, *c.* 176, § 14. U. S. Rev. Sts. § 5047. *Doe* v. *Childress*, 21 Wall. 642. *Cleveland* v. *Boerum*, 24 N. Y. 613.

If, indeed, neither the bankrupt nor the assignee moves for a stay of proceedings, the court may proceed to judgment. *Dunbar* v. *Baker*, 104 Mass. 211. *Cutter* v. *Evans*, 115 Mass. 27. *Doe* v. *Childress*, *ubi supra*. But the court should allow reasonable time for the assignee to come in if he sees fit; and, if either the bankrupt or the assignee seasonably interposes the objection, the proceedings must be stayed.

In *Bosworth* v. *Pomeroy*, 112 Mass. 293, the assignee had been admitted to defend the action, and it was agreed by all the parties that the case stood as if the bankrupt had received his discharge.

In the present case, it having been duly alleged by the bankrupts, and proved to the satisfaction of the court, that sufficient time had not elapsed for them to obtain their discharge, and that there had been no unreasonable delay on their part in endeavoring to obtain it, the action of the Superior Court, refusing a stay of proceedings and ordering judgment, was erroneous.

Exceptions sustained.

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JAMES W. GOODRICH *vs.* JOHN T. WILSON.

Suffolk. Nov. 11, 1875.—Jan. 10, 1876. ENDICOTT & LORD, JJ, absent.

The jurisdiction of a state court over an action by an assignee in bankruptcy against a person, to whom the bankrupt has made a fraudulent preference, is not excluded by the bankrupt act, U. S. St. of 1867, *c.* 176, or by the U. S. St. of 1874, *c.* 390, § 2.

In an action by an assignee in bankruptcy to recover money alleged to have been fraudulently paid by the bankrupt to the defendant, it appeared that the defendant had admitted that a statement made by the bankrupt, at his examination before the register, in regard to the money paid by him, was true. *Held*, that the plaintiff was rightly permitted to show what the statement was by any one who heard it, and the fact that it was made in the course of the bankrupt's examination before the register did not render it incompetent.

In an action by an assignee in bankruptcy to recover money alleged to have been fraudulently paid by the bankrupt to the defendant, evidence of what the bankrupt said to the defendant, some days before, when he borrowed the money of him, as to what he wanted it for, or of statements then made by the bankrupt as to his pecuniary condition, or of the time fixed for repayment, has no bearing on the question whether the defendant knew or had reasonable cause to believe the bankrupt to be insolvent at the time he repaid it.

In an action by an assignee in bankruptcy to recover $1500 alleged to have been fraudulently paid to the defendant by the bankrupt, the defendant asked the judge to instruct the jury that if the defendant made a contract with the bankrupt, before proceedings in bankruptcy had been instituted, to render him personal services and pay for other legal services to be rendered to or for the bankrupt, the contract would be valid, and the assignee would not be entitled to recover the money paid under that contract, if the defendant complied with the terms of that contract; and that the payment was not a preference, unless it was made in pursuance of a fraudulent combination between the bankrupt and the defendant. The judge refused so to rule, and instructed the jury that a person had a right to retain counsel to assist him in the proper discharge of his duty as a debtor in court, under the bankrupt act, but that if insolvent he could not retain counsel for any other purpose; that if the amount was paid as a retainer, with the intent to prevent so much as was in excess of what was reasonable from going to the creditors, and the defendant knew that the payer was insolvent, and knew, or had reasonable cause to know, that he did it for this purpose, the assignee could recover the whole amount paid. *Held*, that the instructions were sufficiently favorable to the defendant, and that he had no ground of exception.

TORT by the assignee in bankruptcy of William F. Wilson, to recover $2700 alleged to have been paid by the bankrupt to the defendant in fraud of the bankrupt act. There were also counts in contract for the same cause of action. Writ dated March 18, 1872.

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The defendant moved to dismiss the action for want of jurisdiction. This motion was overruled, and the defendant filed an answer containing a general denial, and alleging that the sum of $500, and the further sum of $700, were borrowed of the defendant, and were repaid to him while William F. Wilson was solvent, and before bankruptcy proceedings were contemplated; and that the sum of $1500 was paid to the defendant as a retainer in certain proceedings instituted against William F. Wilson, including proceedings in bankruptcy.

At the trial in the Superior Court, before *Bacon*, J., the evidence, which was conflicting, tended to show that the firm of William F. Wilson and Company, consisting of said Wilson and Francis D. Harrington, was formed on or about February 1, 1871; that on or about October 31, 1871, William F. Wilson took sole charge of the firm's business and proceeded to carry it on, a dispute having arisen between him and Harrington as to their respective rights in the firm; that on November 3, 1871, William F. Wilson paid to the defendant $500, which he had previously borrowed of him; that on November 4, William F. Wilson borrowed $700 of the defendant, upon the express agreement to pay it back within three days; that with this $700 William F. Wilson paid some drafts and a note of the firm, which were due that day; that thereafter, on the same day, an attachment was made and a keeper placed over the goods in the store of the firm, in a suit of Weil Brothers & Dreyfus, with whom the firm of William F. Wilson & Co. had an open account; that on November 7, William F. Wilson paid back to the defendant the $700 borrowed on the 4th; that from the 4th to the 9th day of November, negotiations were had with Weil Brothers & Dreyfus with a view to discharge their attachment, when it was discovered that another attachment of $4000 had been put on by Charles H. Baker, a nephew of Harrington, and thereupon William F. Wilson notified the creditors of the firm to be present at the store on November 13; that a meeting of the creditors was had at the store on November 13, and the condition of the firm made known from a statement drawn up by the bookkeeper, showing a nominal surplus of $2100; that at the creditors' meeting a statement was made by the defendant in behalf of his brother, William F. Wilson, that, in view of the troubles which had arisen, and the con-

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sequent injury to the credit of the firm, he, William F. Wilson, would pay said creditors sixty-five cents on the dollar, and assume all the liabilities and carry on the business alone, said payment to be made in the unsecured notes of said William F. Wilson; that the defendant had acted more or less as counsel for the firm since its formation. The plaintiff offered evidence tending to show that the defendant, for his brother, made the ultimatum of sixty-five cents or bankruptcy, which the defendant did not admit; that on November 18, William F. Wilson paid to the defendant $1500 as a retainer, for the purpose of engaging such legal counsel as might be necessary in any legal proceedings that might arise out of William F. Wilson's relations with Harrington, or the affairs of the firm; that on November 23, Harrington, at request of creditors, petitioned said firm into bankruptcy, under the United States bankrupt act; that, after a denial of bankruptcy by William F. Wilson, and a trial, said firm was adjudicated bankrupt on December 21, 1871, and on December 28, 1871, William F. Wilson filed his schedule showing assets to the amount of $13,836.10, and liabilities to the amount of $38,243.01.

Francis D. Harrington testified that he was present when William F. Wilson was examined in bankruptcy and made a statement in regard to paying money to the defendant; that afterwards he went to the office of the defendant, and asked him if the statement made by William F. Wilson, as to paying money to the defendant, was true, and the defendant said it was; that William F. Wilson stated on this examination that he had paid John T. Wilson $1500 retaining fee, and some $1100 for an old debt he owed him; that he paid $500 for a debt he owed his brother, and $700 for money which he said he had borrowed of Wilson; that he said this money was paid about November 20. This testimony was admitted subject to the exception of the defendant.

William F. Wilson testified, for the defendant, that he communicated to the defendant, at the time of borrowing the $700, the purpose to which he proposed to put it, and what he wanted it for. He was then asked to state what he told the defendant he wanted it for, as bearing on the question whether the defendant had probable cause to believe the witness insolvent. The evi-

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lence was excluded, and the defendant excepted. The witness was also asked the following questions, all of which were ruled to be inadmissible, and the defendant excepted: "Did you make any statement to him as to your pecuniary condition at the time that you borrowed that money of him? At the time you got the loan of your brother, was anything said as to the time within which it should be repaid? Was there any time fixed, at the time you borrowed that money, when it was to be repaid?"

The witness further testified that he first learned of the Baker attachment when his brother came to his own office from the sheriff's office; and that this was after the arrangement had been made to pay off the first attachment. He was then asked the following questions, which were ruled out, subject to the defendant's exception: "Had any demand, in any way or shape, been made on you by Baker, for the payment of any claim he had upon you? Was there anything due to Baker and payable at the time that the attachment was put on?"

The defendant requested the judge to instruct the jury as follows: "1. As to the payment of the $1500, if the defendant made a contract with the bankrupt, before proceedings in bankruptcy had been instituted, to render him personal services and procure and pay for other legal services to be rendered to or for the bankrupt, such contract would be valid, and the assignee would not be entitled to recover the amount of money paid under that contract, if the defendant complied with the terms of the contract, and performed such services as may have been required of him, and procured the services of such other counsel as he may have been requested to procure.

"2. The payment was not a preference; being founded on a present consideration, it would be a valid payment, unless it was made in pursuance of a fraudulent combination between the bankrupt and the defendant."

The judge declined so to rule, and instructed the jury as follows: "In regard to the retainer, a person who finds himself insolvent has a right, in good faith, to retain counsel to assist him in the proper discharge of his duty as a debtor in court, under the bankrupt law. He has no right to retain counsel with a view to prevent his property from going to his assignees, or to prevent the same from being distributed under the act, or to defeat or in

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any way impair, hinder, impede or delay the operation and effect of, or evade the provisions of, this act. He cannot, in other words, hire counsel for the purpose of doing anything but his duty under that law, and that is to give all his property, that the law takes, to his creditors through the assignee. He may employ, and it is necessary that he should, and he may take a reasonable sum from his estate and employ counsel and retain counsel for the purpose of assisting him in the proper discharge of his duty as a bankrupt in court. Further than that he cannot. Of course it would not be in good faith to the law for him to employ counsel for any other purpose. He has a right to employ counsel to assist him in the proper discharge of his duty.

The question in this case will be whether the defendant here was retained and paid the sum of $1500 in good faith for the purpose of a proper and lawful discharge of his obligations under the law. If he was retained for any other purpose; if he was retained for the purpose of hindering, delaying or impeding the provisions of this act, then that retainer was an unlawful retainer, which he had no right to make; and, if the defendant knew it, knew that he was insolvent, and received the money for any such purpose, knowing that that was the intent on the part of William F. Wilson, then the retainer was an unlawful retainer, which was in violation of the provisions of this act, and which the assignee can recover. In order to recover under the provisions of the act, it must be shown, what is not denied in this case, first (that is, the first proposition is not denied) that William F. Wilson was insolvent at that time, or acting in contemplation of insolvency. That proposition there could be no question about. Was the retainer paid with a view to prevent the amount of the retainer, or any part of it, from going to the assignee and being distributed under this act? If it was the purpose of the parties, and known to be such by both of them, to pay for improper services, or to put under the guise and pretence of a retainer a large sum of money in the hands of the defendant, so as to prevent its going to the assignee, or for the purpose of hindering, delaying or impeding the provisions of law, then the whole act of the parties would be vitiated by the fraud, and the whole amount can be recovered in this case. For instance, if the sum of $500 was a proper retainer to be paid, and the parties, with the intent to

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prevent the other $1000 from going to the creditors, agreed upon a retainer for $1500, the whole transaction would be vitiated by the fraud, and the assignee would have a right to recover the whole amount. If, then, William F. Wilson was insolvent, or acting in contemplation of insolvency; if he paid $1500 to his brother, the defendant, as a retainer, and the object and purpose of that was to prevent that sum, or any material portion of that sum, from being distributed under the provisions of the law, and the defendant knew that William F. Wilson was insolvent, and knew, or had reasonable cause to know, that he did it for this purpose, the plaintiff would be entitled to your verdict. On this point I do not intend to express any opinion, but leave it to you to determine. I have stated the principles of law, as I understand them, applicable to this case, and I leave the case in your hands. The burden of proof is on the plaintiff on both propositions."

The jury returned a verdict for the plaintiff for the sum of $2491.50; and the defendant alleged exceptions.

E. Avery, for the defendant.

N. B. Bryant, for the plaintiff.

GRAY, C. J. The jurisdiction conferred upon the courts of the United States as courts of bankruptcy extends to all controversies between the bankrupt and his creditors, and to the collection, marshalling and distribution of his assets. But the jurisdiction of suits at law or equity between the assignee in bankruptcy and any person claiming an adverse interest, is conferred by a distinct provision of the act of Congress, and is not incidental to the jurisdiction in bankruptcy. The jurisdiction in bankruptcy is exclusively vested in the Circuit and District Courts of the United States, and their exercise thereof is not subject to revision by the Supreme Court of the United States. The jurisdiction of suits by or against assignees in bankruptcy is part of the common law and equity jurisdiction of the lower courts of the United States, and is subject to the revision of the Supreme Court of the United States by appeal or writ of error, and does not exclude the concurrent jurisdiction of the state courts. U. S. St. 1867, *c.* 176, §§ 1, 2. *Ward* v. *Jenkins*, 10 Met. 583. *Hanson* v. *Herrick*, 100 Mass. 323, 326. *Otis* v. *Hadley*, 112 Mass. 100. *Smith* v. *Mason*, 14 Wall. 419. *Marshall* v. *Knox*, 16 Wall. 551. *Stickney* v. *Wilt*, 23 Wall.

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The effect of the provision of the act of Congress of 1874, c. 390, § 2, is not to confer or take away jurisdiction of the state courts, but simply to allow the federal courts of original jurisdiction to decline to entertain actions at common law, to which the assignee is a party, in which the debt demanded is less than the amount which determines the jurisdiction of those courts in other cases. See U. S. Rev. Sts. §§ 629, 639, 711, 4972, 4979.

The evidence offered by the plaintiff was competent. Evidence having been introduced tending to show that the defendant admitted that the statement made by the bankrupt in his presence was true, the plaintiff certainly might prove what that statement was, and this might be done by any one who heard it. The fact that it was made in the course of the bankrupt's examination before the register did not render it incompetent. *Lynde* v. *McGregor*, 13 Allen, 182.

The exceptions to the admission of the evidence offered by the defendant cannot be sustained. What the bankrupt said to the defendant, at the time of borrowing money from him, could have no bearing upon the question whether the defendant knew or had reasonable cause to believe the bankrupt to be insolvent at the time of the repayment of the money, some days afterwards. The bill of exceptions does not show that the inquiries as to the claim and attachment of Baker were relevant or material.

The question whether the payment of money to the defendant by way of retainer was lawful and valid was rightly submitted to the jury, under instructions sufficiently favorable to him.

Exceptions overruled.

BOSTON & SANDWICH GLASS COMPANY *vs.* H. K. MOORE.

Suffolk. Nov. 11, 1875. — Jan. 10, 1876. ENDICOTT & LORD JJ., absent.

The following instrument signed by the defendant was delivered to the plaintiff: "I guarantee the sum of five hundred dollars value in glass shades purchased by my son A. from B. Terms of purchase to be sixty days from date of invoice, and, if not paid within ninety days, draft to be drawn on me for the amount." *Held*, that it was not a continuing guaranty. *Held, also*, that parol evidence of the previous dealings, or of the dealings contemplated, between the creditor and the principal

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debtor; or that the guarantor had previously agreed to give the plaintiff a guaranty for future advances, and that the goods were sold relying on such guaranty; or that the relations of the principal parties were well known to the guarantor, was not admissible to show that the instrument was other than a guaranty of a single transaction.

CONTRACT upon the following written guaranty, signed by the defendant: "Boston, September 10, 1872. For and in consideration of the sum of one dollar herein paid, the receipt of which is hereby acknowledged, I guarantee the sum of five hundred dollars ($500) value in glass shades purchased by my son, C. C. L. Moore, from the Boston and Sandwich Glass Company. Terms of purchase to be sixty days from date of invoice, and, if not paid within ninety days, draft to be drawn on me for the amount."

At the trial in the Superior Court, before *Allen*, J., the plaintiff offered to prove that it was a corporation doing an extensive business in the manufacture and sale of all kinds of glass ware, and that the two sons of the defendant, C. C. L. Moore and F. K. Moore, went into the business of selling glass shades in New Orleans, Louisiana, and that C. C. L. Moore was a clerk in the United States Navy Yard, in Charlestown, in this Commonwealth, and had no means of his own, and that F. K. Moore resided at New Orleans, and there sold the goods sent to him by his brother, C. C. L. Moore; that the plaintiff had dealt with C. C. L. Moore to a considerable extent, prior to September 10, 1872, and so continued to deal until that time, he, C. C. L. Moore, buying glass shades in small quantities and principally for cash, and sending them to his brother, F. K. Moore, to be by him sold in New Orleans; that the defendant knew what the relations were between the plaintiff and C. C. L. Moore, and on or about September 10, 1872, C. C. L. Moore, with the knowledge of the defendant, endeavored to obtain from the plaintiff a much larger quantity of goods than formerly, and on a credit of two months' time, and represented to the plaintiff that he and his brother in New Orleans were going to extend and build up a large business in said glass shades in New Orleans, and wanted to purchase a large quantity of goods, and to establish a credit for an indefinite length of time; and as the plaintiff was unwilling to trust C. C. L. Moore, without security, and to induce the plaintiff to sell him said goods as aforesaid, C. C. L. Moore offered to have the de-

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fendant give a guaranty to the plaintiff in the sum of $500, on account of the sales that might thereafter be made by the plaintiff to said C. C. L. Moore; and one of the agents of the plaintiff thereupon called upon the defendant and made known to him all the facts, representations and negotiations that had passed between said C. C. L. Moore and the plaintiff, and also what the future course of business and dealing was to be between the parties above spoken of; and thereupon the defendant agreed to give such a guaranty for the purpose of assisting his sons and to build up the said business; that the agent of the plaintiff drew up the guaranty mentioned above, and the defendant signed and delivered it to the plaintiff's said agent, and the plaintiff, relying upon said guaranty, immediately commenced to deliver goods and to charge them to the said C. C. L. Moore, and to ship them at his request to New Orleans, and that goods to the amount of $2049.22 were so shipped between September 13, 1872, and April 19, 1873, of which sum the said C. C. L. Moore paid to the plaintiff $1000 in small sums on account at different times out of funds that he received from his brother in New Orleans; that in June, 1873, one of the agents of the plaintiff called upon the defendant and told him how much the indebtedness of his son, C. C. L. Moore, to the plaintiff was, and that it had been ninety days overdue, and demanded of him payment of the five hundred dollars that he had guaranteed to the plaintiff; and that on July 10, 1874, the plaintiff presented to the defendant a draft drawn by the plaintiff on him for the sum of $500 on the said account, and acceptance and payment of said draft was refused, that the indebtedness of C. C. L. Moore to the plaintiff still remains unpaid, to the amount of about $1100.

The defendant contended that upon the facts offered to be proved, so far as competent, the action could not be maintained; that the guaranty did not remain in force after $500 worth of goods had been delivered to said C. C. L. Moore, and paid for, as stated in the plaintiff's offer of proof; and that the proof offered was not competent and sufficient to show that the defendant was liable for any goods furnished after the $500 worth first delivered under the guaranty were paid for.

The judge, by consent of parties, reported the questions of law so arising for the determination of this court. If the action could

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not be maintained, judgment was to be entered for defendant otherwise the case to stand for trial.

M. Holbrook, for the plaintiff.

C. D. Adams, for the defendant, was not called upon.

COLT, J. The question submitted by this report is whether the instrument declared on is to be construed as a continuing guaranty which affords security to the plaintiff for credits given to the principal in successive transactions, or as a guaranty confined to one transaction, and therefore satisfied by a single purchase of the goods named to the specified amount followed by payment for the same.

The rules which govern the construction of written contracts are to be applied to this; one of which is, that where there is no ambiguity in the terms, the writing itself must be alone consulted in ascertaining the intention; parol evidence to vary its contracts is excluded.

In this contract the language, as applied to the subject matter, discloses no ambiguity. There is nothing in it which fairly gives rise to the inference that it is intended to apply to more than one purchase. The liability assumed cannot be enlarged or diminished by evidence of the previous dealings, or of the dealings contemplated, between the creditor and the principal debtor; or that the defendant had previously agreed to give the plaintiff a guaranty for future advances, and the goods were sold relying on such a guaranty; or that the relations of the principal parties were well known to the surety. The question is not what would have been a fit and proper contract for the defendant to have made under all the circumstances, but what contract did he make. This contract is confined to the purchase of a single quantity of goods of a specified value, for which, if not paid for within sixty days from the date of invoice, the plaintiff is to draw on the defendant for the amount.

In *Hatch* v. *Hobbs*, 12 Gray, 447, cited by the plaintiff, the agreement was to pay for goods drawn out from time to time, "this guaranty to remain good until further order, or until April 1." In *Bent* v. *Hartshorn*, 1 Met. 24, to pay for goods purchased "at any time hereafter." And in *Nottingham Hide Co.* v. *Bottrill*, L. R. 8 C. P. 694, to pay "any account he [the principal] may have with you; and when to the contrary we will write you." *Judgment for the defendant.*

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CHESTER D. PRATT *vs.* HENRY W. PAINE & another, trustees.

Suffolk. Nov. 11, 12, 1875. — Jan. 10, 1876. ENDICOTT & LORD, JJ., absent.

A lease of a dwelling house for five years provided that the lessor might terminate the lease by notice, and that, if this was done during the first three years of the term, the lessee should be paid such sum as a compensation for the loss he may "by such abridgment of the term sustain in consequence of expenditures incurred by the lessee in fitting up the premises, and expenses incurred in removing." In an action by the lessee to recover for expenses incurred by him in fitting up the premises, the lease having been terminated by notice within the three years, it appeared that, at the time the lease was made, the building was in thorough repair; but the lessee made some changes in it, and furnished it. *Held*, that the term "fitting up the premises" included not only the fitting up of the building and premises to the uses of the lessee, but the fitting of his furniture to the building, such as carpets, window curtains and the like. *Held, also*, that the measure of the lessee's damages was the loss sustained by reason of his having incurred such expenditures the full benefit of which he had lost by the abridgment of his lease, and not the entire cost of fitting up.

In an action to recover compensation for services in effecting a lease, the plaintiff contended that the defendant agreed to pay him regular brokers' commissions, and put in evidence of what a broker would be entitled to by the custom. The judge ruled, against the defendant's objection, that the custom was a reasonable one, and instructed the jury that they should find according to the custom, if they found that the defendant agreed as alleged; but that, if they found that the services were rendered without an agreement as to compensation, they should find the value of the services. The jury returned a verdict for a less sum than that testified to as allowed by the custom. *Held*, on the defendant's bill of exceptions, that the question of the reasonableness of the custom need not be considered

CONTRACT against the trustees under the will of Isaiah Atkins. The first and third counts were upon a lease whereby the defendants leased to the plaintiff certain premises on Kingston Street, in Boston, for a term of five years from October 1, 1871, "to use and occupy the premises only as a dwelling house," and containing the following clause:

"Provided, however, that the said lessors, or those having their estate in the premises, may, at any time during the term, terminate this lease by giving to the lessee, or those holding under him, three months' notice in writing of their intention so to do; and, if such notice shall be given any time during the term, the lessee, or those having his estate in the premises, shall have the right to continue in occupation of the premises during the three months next ensuing the day on which such notice shall be given, free of all obligation to pay rent; and, if such notice shall be

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given during the first three years of the term, the lessee, or those having his estate in the premises, besides his right to occupy as aforesaid shall be paid such sum as a compensation for the loss he or they may by such abridgment of the term sustain in consequence of expenditures incurred by the lessee in fitting up the premises, and expenses incurred in removing, as shall be determined by two appraisers to be appointed one by the lessors and one by the lessee, upon the premises being vacated in accordance with the notice."

The second count was as follows: "And the plaintiff says the defendants owe the plaintiff the sum of eight hundred dollars according to the account hereto annexed: H. W. Paine and Isaac F. Dobson, trustees, to Charles D. Pratt Dr. To commissions and services in negotiating lease of 17 Kingston St. Boston, to George K. Snow and George W. March, 20 years' lease at $4000 per annum, total rent $80,000, at 1 per cent. $800."

Trial in the Superior Court, before *Putnam*, J., who allowed a bill of exceptions in substance as follows:

The plaintiff hired the premises for the purpose of a boarding house, and the premises had been put in thorough repair by the defendants at the time the lease was given. The plaintiff entered upon the premises on the first day of the term, and continued to pay them rent, and proceeded at once to furnish the house throughout with carpets and furniture of various kinds, part of which was new. The time required to furnish the house ready for the reception of the boarders was about one month. The plaintiff also made some changes in the rooms, put up a partition and cut a door through, put in new furnace flues, a new floor, and painted the roof.

On November 18, 1872, the lessors gave the lessee a written notice to vacate the premises in accordance with the above provision in the lease, and the plaintiff vacated the premises in accordance with said notice. Two persons were appointed as appraisers, who were unable to agree upon the sum to be paid the plaintiff, and the plaintiff and defendants were unable to agree upon any other appraisers.

The plaintiff claimed as part of the expenditures included in the phrase "fitting up the premises" the expense in furnishing the house as well as the alterations made by him, and requested

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the judge to rule that the construction of the phrase "fitting up the premises" depends upon the circumstances of the case and the purpose for which they were to be used, and, the purpose being that of a boarding house, the plaintiff is entitled to recover for loss caused by his expenditures in furnishing the house with such furniture, including carpets, rugs, curtains, as well as alterations to the rooms, so as to render the house suitable for the reception of boarders; that the phrase "fitting up the premises," under all the circumstances of the case, means furnishing all kinds of furniture as well as alterations to the building.

The judge refused so to rule, but instructed the jury that the term "fitting up the premises" meant, all the expenses the lessee was at, during the term, in doing anything to the premises to adapt them to his use, and also the expenses of specially fitting any furniture to the premises, such as carpets, window curtains and the like; that is, the labor and expense of fitting it, and the depreciation in value upon it. The plaintiff excepted to this ruling, and to the refusal to rule as requested.

The defendants requested the judge to rule that the words "fitting up the premises" included only the actual alterations and additions made to the house by the lessee as hereinbefore recited, and did not include carpets or curtains, or any other furniture whatever; but the judge ruled as before stated; to which ruling and refusal to rule as requested the defendants excepted.

In support of the second count, the plaintiff's evidence tended to show that the defendants employed him to procure for them a tenant, and agreed to pay him therefor the regular commission; this was controverted. The only evidence of value of services was that of certain real estate brokers, who testified that by the custom in Boston, the broker who negotiated a lease of twenty years, or of over three years, was entitled to receive from the lessor one per centum on the whole rent, stipulated to be paid by the lessee; that the commission on sale of real estate was one per cent. on price, and that the commission on lease of less than three years was five per cent. on one year's rental. The defendants asked the judge to rule that this custom was unreasonable.

But the judge instructed the jury that the custom was reasonable, and, if they found that the defendants agreed as alleged, they should find according to the custom; but if they found the

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services rendered without an agreement as to compensation, then they should find the value of the services. The jury found on this count $500; the plaintiff claiming, according to the custom. To this ruling and refusal the defendants excepted.

The report of an auditor, which was made part of the bill of exceptions, in respect to the second count, was as follows: "On the whole evidence I do not find that the plaintiff has proved a special contract for regular brokers' commissions for procuring the lessees upon a new lease. I do find that the plaintiff was engaged by the defendants to procure such lessees, and that in pursuance of the contract he brought the parties together, and the result was a lease for twenty years, at $4000 per annum for the first ten years, and $5000 per annum for the last ten years. I find that for this service the plaintiff is entitled to reasonable compensation, which reasonable compensation I find to be $500."

E. Avery & C. S. Lincoln, for the plaintiff.

R. D. Smith, for the defendants. 1. "Fitting up the premises" as used in this lease includes only the actual additions to the realty in the nature of permanent fixtures. The expression "fitting up" in common use when speaking of a shop, house or office, conveys an idea quite different from "furnishing." It is so used by the plaintiff's counsel in the bill of exceptions, and in his prayer for instructions. If the plaintiff had asked the judge to rule that "fitting up" meant putting in "fittings," no ordinary mind would suppose that furniture was included; and when he says that fittings means "furniture," the question naturally arises why, if that was the meaning to be conveyed, did not the parties use the more common word? The idea conveyed by the expression "fitting up a house" is the doing of something which precedes the "furnishing" thereof. It implies the adding of something which would pass to a subsequent purchaser. The word "fittings" implies a fitness, an adaptation of a thing fitted to a particular place or thing to which it is fitted, (*fingo.*) It implies a thing made for a place, (*fait, facere, fact*, 2 Diversions of Purley 27.) The word "fitter" also occurs in several compounds. A gas-fitter is one who puts in gas pipes, and adapts gas pipes and fixtures, so called, to a building; he is not a furnisher of gas. To fit a coat has quite a different meaning from furnishing a coat. "Furnish" has come to be a synonym of "supply." The first

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meaning of *fingo* is to mould. In all the derivatives of fit the idea of moulding, adaptation by cutting or placing or trying on is present. We submit, then, that fittings means true fixtures put into a place, adapted to them or to which they are adapted. "The carpenter stretcheth out his rule, he marketh it out with a line; he fitteth it with planes." Isaiah xliv. 13.

It will doubtless be asked why the parties did not use the word "fixtures," if that would express the idea. The cause is obvious, fixtures has ceased to denote that positive fixation or annexation which its root (*figo*) denotes, and means now quite as often something which can be taken out without disturbing that to which it is annexed, as something which being affixed remains a part of the realty. *Hallen* v. *Runder*, 1 Cr., M. & R. 266. *Gibson* v. *Hammersmith Railway*, 11 W. R. 299. *Sheen* v. *Rickie*, 5 M. & W. 175. It is used in both senses in the two opinions in *Guthrie* v. *Jones*, 108 Mass. 191, 193, 195. In *D'Eyncourt* v. *Gregory*, L. R. 3 Eq. 382, Lord Romilly, to convey his meaning, has to speak of "fixtures inseparably attached to the freehold," and "not removable by the tenant." Whereas, in the same case, Sir Roundell Palmer and Mr. Jessel in argument use "fittings" and "fitting up" as conveying the idea of permanent fixtures, such as panels, wainscots, &c. The parties to this lease wanted a narrower word than fixture. It is doubtless true that fittings are always fixtures attached to the freehold, but it does not follow that fixtures are fittings. Fitting (*Vitten*) has that more persistent and inherent significance which clings to a Saxon root. It is more precise than fixture or fixure derived from French *fixer*. It is much more definite than the other French word furniture, which it is attempted here to include within it. Therefore as furniture, though fastened to the walls, is distinguished from fixtures; *Guthrie* v. *Jones*, 108 Mass. 191; so fittings, being one class of fixtures or things fastened, and being of a narrower significance than fixtures, cannot properly include what is generally termed furniture. The furniture of a house includes curtains, (tapestry and arras,) window shades and carpets, though nailed upon walls or floors. It can scarcely be contended that "fitting up" the premises has a meaning more favorable to the plaintiff than "fitting" the premises, "up" certainly cannot signify tables and chairs. It seems rather to imply putting up partitions, doors

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and floors than nailing down carpets and placing beds and washstands. Besides this, the plaintiff contends for too much; he makes fitting up include alterations, (by partitions, doors, &c.,) and also all kinds of furniture. The word does double duty and is overworked. He admits that it covers what we say it covers. He attempts to stretch it. *Expressio unius est exclusio alterius.* If this word in this lease was not intended to include furniture, but was intended to include only that which the defendant contends, it follows that it was not intended to include furniture in its ordinary sense. And in this description, "furniture," must, we submit, be included carpets, mirrors, window shades, and the like, fastened with nails to walls or floors for temporary convenience; chattels, in the case of boarding houses, in their character most migratory, "usually disappearing on the verge of quarter day and generally by night."

The language of the lease is inartificial. What was the lessee to have? It was compensation for loss, occasioned by abridgment of the lease, in consequence of the expenditures incurred by the lessee. The loss, of course, was not a consequence of the expenditure. The meaning is loss by reason of having made an outlay which the abridgment of the lease compels him to abandon earlier than he would do if the lease expired by limitation. This, of course, is not, as ruled, the expense of "doing anything to the premises to adapt them to his use," or "the expense of specially fitting any furniture to the premises, such as carpets, window curtains and the like; that is, the labor and expense of fitting it, and the depreciation in value upon it." All this adapting of the premises and fitting of carpets the plaintiff would have incurred anyway. They were expenditures incurred, but no loss was "sustained" in "consequence of these expenditures." By the termination of the lease the lessee did not enjoy these outlays so long. It seems, then, that the measure of damage must be interest on the cost of the "fittings up," whatever that may be, during the remainder of the term. An examination of the lease itself may throw some light upon the meaning of the parties. The demise was to use and occupy only as a dwelling house. If, therefore, the premises were hired for a boarding house, as stated in the bill of exceptions, this was not with the consent of the defendants and they cannot be prejudiced thereby. We think that "dwell

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ing house" will not be found to mean "boarding house" any more than "fitting up" means "furnishing." See *Gannett* v. *Albree*, 103 Mass. 372.

Again it will be said that, the house being in perfect repair at the time of the demise, excludes the theory that "fitting up" can mean repairs. Nevertheless the lessee at once did some "repairs" which the plaintiff claims are "fitting up." The "fitting up" which is referred to in the lease, is that "which may be done during the term." If the house was in repair, "fitted up," at the beginning, it does not follow it would remain so during the whole term. Upon examination of the language of the lease, it is inconceivable when the parties stipulate concerning expenses of fitting up and expenses incurred in removing, that, in carrying their minds over the entry upon possession to what was to be done at the end of the term, they should have omitted so important a matter as the expenses incurred in furnishing, had it been their intent to include it. The "*In medio tutissimus ibis*" theory has tempted the presiding judge to walk upon a narrow isthmus; and, in balancing between the claims of the parties upon the meaning of "fitting up," he has entirely lost sight of the rule laid down by the lease for estimating damages, and allowed the jury to understand that the entire cost of additions or alterations, of fitting carpets and curtains, and the depreciation in the value thereof, was to be allowed. This is not the rule. The lessee is not to receive as damages the entire cost of "fitting up" which he has enjoyed a year or more, and of which the enjoyment is only abridged by the termination of the lease. We have nothing to do with depreciation. It is compensation for the loss sustained by abridgment of the lease that the case provides for. If depreciation of carpets and furniture were included at all, the damages are only the difference in depreciation between them at the time they are given up and one and one half years later, in proportion to the time they have been in use. It is the shortening of the period of enjoyment. Depreciation would be greater the longer they are used. The jury must have been misled by the use of this language.

The argument on the second count is omitted.

COLT, J. The clause in the lease, the interpretation of which is in dispute, was plainly intended to provide indemnity to the

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lessee for loss sustained by him in case the lessors should exercise a reserved right to abridge the term by notice. This intention is not to be lost sight of. The words of the agreement are, that the lessee shall be paid such sum as a compensation for the loss he may, by such abridgment of the term, sustain "in consequence of expenditures incurred by the lessee in fitting up the premises, and expenses incurred in removing," as shall be awarded to him in the mode provided. These words as used in this lease, applied to the subject matter and the condition of the premises, cannot fairly be interpreted as including only the actual additions to the real estate in the nature of permanent fixtures. In our opinion they have a broader signification, and include not only the fitting of the building and premises to the uses of the lessee, but the fitting of his furniture to the building. This construction was adopted by the judge at the trial, and is not open to exceptions by either party.

But it was urged at the argument by the defendants that the jury were nevertheless misled by the language used by the judge in his ruling upon this point. The judge ruled that "the term 'fitting up the premises' meant all the expenses the lessee was at, during the term, in doing anything to the premises to adapt them to his use," and in fitting furniture to the same, "that is, the labor and expense of fitting it, and the depreciation in value upon it."

Without doubt the true measure of the plaintiff's damage is the loss he has sustained by reason of having incurred expenditures, the full benefit of which he has lost by the abridgment of his lease. The lessee is not to receive as damages the entire cost of a fitting up, the benefit of which he has enjoyed for a part of the term. It is the shortening of the period of enjoyment of which he complains. But we are not satisfied, upon this bill of exceptions, that the jury could have been misled by the language used as to the true rule of compensation. The ruling was not objected to at the trial as inaccurate in this respect; it does not appear to be all the instruction given on this part of the case, and, although open to criticism, it could not have conveyed the idea, in connection with the clause in the lease, that the jury were to disregard the rule now stated as the true rule. The judge was evidently pointing out the elements which must enter into the computa-

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tion in arriving at the loss sustained by the plaintiff, rather than stating the principle upon which compensation should be made, and he must have been so understood.

The second count is upon an account annexed to recover for commissions and services in negotiating a lease of the premises to another party. There was conflicting evidence on the question whether the defendants agreed to pay regular brokers' commissions. The plaintiff relied on the existence of a custom which entitled a broker to charge the lessor on a lease of twenty or over three years, one per cent. on the whole rent stipulated to be paid, while the commissions on sales of real estate were only one per cent. on the price paid.

The court ruled, against the defendants' objection, that this was a reasonable custom. But it is not necessary now to pass upon the question, because the amount of the verdict shows that the jury must have negatived the existence of an agreement to pay commissions, and founded their verdict on the value of the plaintiff's services. This they were warranted in doing under the pleadings, under the instructions given and not excepted to, and upon the report of the auditor, which was before them as evidence. *Exceptions overruled.*

IN THE MATTER OF THE FRANKLIN TELEGRAPH COMPANY.

Suffolk. Nov. 16, 1875. — Jan. 10, 1876. COLT & LORD, JJ., absent.

Under the Gen. Sts. *c.* 68, § 35, authorizing this court "for reasonable cause" to "decree a dissolution of" a corporation, upon a petition by a "majority in number or interest of the members," it is no ground for the dissolution of a telegraph company that it leased its line to another company at a less rent than it might have obtained, fraudulently intending to give the benefit of the lease to the second company, in which the majority in interest of the stockholders of the first company were also interested, if, after the filing of the petition for dissolution, the lease is cancelled by vote of the directors of both companies.

PETITION under the Gen. Sts. *c.* 68, § 35, filed December 9, 1874, by a majority in number of the stockholders of the Franklin Telegraph Company, a corporation established by the St. of 1865, *c.* 119. An answer containing a demurrer was filed in be-

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half of the company, and, when the cause came on for hearing, an additional answer was filed by consent, the allegations of which were not disputed. The case was reserved by *Morton*, J., for the consideration of the full court upon the petition, the issue raised by the demurrer and the additional answer. If in the opinion of the court the petition could be maintained, the case was to stand for trial; otherwise, the petition to be dismissed. The substance of the pleadings appears in the opinion.

J. R. Bullard, for the petitioners.

S. Bartlett & D. Thaxter, for the Franklin Telegraph Company.

DEVENS, J. Assuming, without deciding, that, under the authority given to this court by the Gen. Sts. *c.* 68, § 35, it was intended to provide not only an easy and convenient mode of dissolving a corporation, when the purposes of its organization could not be successfully prosecuted, but also to impose as a penalty the forfeiture of its charter, when there were frauds committed or to be apprehended from its officers, in the internal management of its affairs, so that the stockholders had received or would thereafter receive less profit, and also that these petitioners might properly maintain such a petition, still no reasonable cause for an order to that effect has been presented here, such as the statute requires. Such a power is one of great delicacy, and must be exercised with extreme caution, as the dissolution of a corporation must affect seriously not only the property of the petitioners, and of those by whom such frauds may have been committed, or from whom they are to be apprehended, but also of those stock holders who are no parties to the controversy as such, and are represented in it only through the corporation itself. No proceeding so radical as the destruction of the organization should be taken, unless, after careful examination, the court were fully satisfied, whatever the disadvantages and losses attending such a step might be, that in no other way could the rights of all innocent stockholders be so well protected.

Upon the facts as admitted by the demurrer, the Franklin Telegraph Company leased its line to the Atlantic and Pacific Company at a less rent than it might have obtained, fraudulently intending to give the benefit of this lease to that company in which the majority in interest of the stockholders of the

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Franklin Telegraph Company were also interested; and while the petition alleges certain other acts done, some in fraud and others to the inconvenience of the petitioners, this is the ground upon which it seeks the dissolution of the corporation and the appointment of a receiver. By the additional answer, which is also before us, it appears that, since the petition was filed, the lease in question has been cancelled by vote of the directors of each of the two companies.

The only injury alleged as a sufficient reason for the dissolution has therefore ceased to exist by the abrogation of the lease. But it is now argued that, as the majority in interest has exhibited a disposition to deal unfairly with the rights of the minority of the stockholders, they can no further be trusted, and that, as the court would discharge trustees who had wilfully violated the duties of their trust, so here it should dissolve the corporation. Because the majority had once violated its duties, to destroy, by a dissolution of the corporation, the valuable rights which all the stockholders have by virtue of its charter, would be to apply a remedy which would be much more formidable than any danger to be feared. The mere vague apprehension of some future mischief is not the reasonable cause which by the statute is made the foundation of the action of this court. *Petition dismissed.*

CONNECTICUT TRUST AND SAFE DEPOSIT COMPANY *vs.* HENRY J. MELENDY & another.

Suffolk. Nov. 10, 1875. — Jan. 11, 1876. ENDICOTT & LORD, JJ., absent.

In an action upon a promissory note against the maker, it appeared that, after the note matured, an arrangement was made by which a new note for the same amount was given, signed by the indorsers of the note in suit, and the issue was whether the new note was given in payment of the note in suit or as collateral security for it. One of the indorsers was an attorney at law, and was called as a witness by the plaintiff. Upon cross-examination it appeared that he had aided the plaintiff in the proceeding taken to enforce the note in suit against the defendant. *Held*, that the significance of the witness's acts, as evidence of payment, was for the jury; and that the judge rightly refused to rule, as requested by the plaintiff, that

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the fact that the witness aided in collecting the note was no evidence of its payment.

In an action upon a promissory note against the maker, it appeared that, after the note matured, an arrangement was made by which a new note for the same amount was given, signed by the indorsers of the note in suit, and the issue was whether the new note was given in payment of the note in suit or as collateral security for it. The new note was given in another state, by the law of which the giving of a promissory note was not presumed to be in payment of a preëxisting debt. *Held*, that it was a question of fact for the jury, upon the circumstances of the case, whether the fact that the new note was credited upon the books of the holder was evidence of payment. *Held, also*, the plaintiff having requested an instruction that the presumption of law is that the holder did not intend to accept the note in payment and to discharge the maker of the note in suit, and, unless the jury find that a distinct agreement was made to accept the note in payment, they cannot find that it was accepted in payment, and, the instruction being given in substance, though not in the words requested, that the plaintiff had no ground of exception.

In an action upon a promissory note against the maker, it appeared that, after the note matured, an arrangement was made by the agent of the indorsers, by which a new note for the same amount was given, signed by the indorsers of the note in suit, and the issue was whether the new note was given in payment of the note in suit or as collateral security for it. The new note was given in another state, by the law of which the giving of a promissory note was not presumed to be in payment of a preëxisting debt. The plaintiff requested the judge to instruct the jury that, unless the indorsers intended to give their note in payment of the note in suit, it would not be a payment. The judge declined to give this instruction, and instructed the jury that the transaction at the time the new note was given is not only to be considered with regard to what the indorsers did and intended to do about it; if the plaintiff, who was the real creditor, chose to receive it and did receive it as payment and surrendered the note in suit, gave it up and received that in payment, then it was a payment. *Held*, the judge having previously instructed the jury that the defendant must prove an agreement between the parties that the new note was to be taken as payment of the old one, that the plaintiff had no ground of exception.

CONTRACT upon a promissory note dated June 20, 1872, made by Melendy, Dexter & Co., payable three months after date to the order of the Odorless Rubber Co., and indorsed in blank by the payee, "by Robert Snyder, Treas.," and by Samuel L. Warner, Samuel Hubbard and C. C. Post. At the trial in the Superior Court, before *Aldrich*, J., the jury found for the defendants, and the plaintiff alleged exceptions, the substance of which appears in the opinion.

G. O. Shattuck & O. W. Holmes, Jr., for the plaintiff.

G. W. Park, for the defendants.

MORTON, J. The defence in this case was that the note in suit was signed by the defendants at the request and for the ac-

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commodation of the Odorless Rubber Company, the payee, and of Warner, Hubbard and Post, the indorsers, who were officers or stockholders of said company, and that the note had been paid by the indorsers. The evidence tended to show that, after the note matured, Graham, acting for the indorsers, made an arrangement with the plaintiff corporation by which he was to give it their note for the same amount; that he gave it such note, signed by Warner, Hubbard and Post, and the note in suit was delivered to him. The principal question at the trial was, whether the new note was given in payment of the note in suit, or merely as collateral security for it. Upon this issue the court instructed the jury, that, as the transaction took place in Connecticut, it was to be governed by the law of that state; that by that law the giving of a promissory note was not presumed to be in payment of a preëxisting debt, and therefore, before they could find for the defendant, they must be satisfied that, by the agreement of the parties, the plaintiff received the new note in payment of the note in suit. No exception was taken to this instruction by either party, but the only exceptions taken were to the refusal of the court to give certain additional instructions requested by the plaintiff.

1. Warner, one of the indorsers, was an attorney at law, and was called as a witness by the plaintiff. Upon cross-examination, it appeared that he had aided the plaintiff in the proceedings taken to enforce the note in suit against the defendants.

The plaintiff requested the court to instruct the jury "that the fact that Warner aided in collecting the note is no evidence of its payment." The court properly refused this request. It was for the jury to determine what was the significance of the acts of the witness, and how far they tended to contradict his testimony, and thus indirectly bore upon the question of payment. There is nothing in the bill of exceptions to show that the evidence was admitted or applied for any other purpose.

2. The court properly refused to rule that "if it were shown that the new note was credited upon the books of the Trust Company, it would be no evidence of payment." The entries upon the books of the plaintiff, and such explanations as it chose to give, were properly before the jury, and they alone had the right to judge of their weight as evidence upon the issue before them

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3. The third requested instruction was that "the presumption of law is, that the company did not intend to accept the note in payment, and to discharge Melendy and Dexter; and unless the jury find that a distinct agreement was made to accept the note in payment, they cannot find that it was accepted in payment."

This instruction was given in substance by the court. The plaintiff has no ground of complaint, because the subject of the request was fully covered by the instructions given.

4. At the close of the charge to the jury, and as they were about to retire, the plaintiff asked the court to give the additional instruction "that, unless Hubbard, Warner and Post, the indorsers, intended to give their note in payment of the note in suit, it would not be a payment."

The court refused this instruction, but in answer to it instructed the jury that "the transaction at the time the new note was given is not only to be considered with regard to what Warner, Hubbard and Post did and intended to do about it. If the bank received the new note; if the bank, which was the real creditor, chose to receive it and did receive it as payment, and surrendered this note in suit, gave it up and received that in payment, then it was a payment."

The instruction asked makes the question, whether there was an agreement between the plaintiff and the agent of the indorsers, that the new note should be in payment of the old, turn wholly upon the intentions of the indorsers, without regard to the acts and agreements of the agent. It would tend to confuse and mislead the jury, and was properly refused.

The additional instruction given in answer to it, if it were to be considered by itself, as intended to state the whole law applicable to the subject, would be imperfect. But it cannot fairly be so considered. The court had distinctly and repeatedly instructed the jury that the defendant must prove an agreement between the parties that the new note was to be taken as payment of the old one. The additional instruction was given, and must be construed with reference to these previous instructions. Thus construed, we think it was intended substantially to repeat the former instructions, and to instruct the jury that, if the bank received the new note, under such an agreement, as payment, and surrendered the old note, it was a payment, although the indorsers may

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have had an undisclosed intention that it should not be payment. In this sense, and we can have no doubt that the jury so understood it, it is not open to just exception.

Exceptions overruled.

ISAAC FARRINGTON & another *vs.* DAVID M. HODGDON & others.

Suffolk. Nov. 10, 1875. — Jan. 11, 1876. ENDICOTT & LORD, JJ., absent.

An agreement of creditors "to accept seventy-five per cent. of the amount of indebtedness as set against our respective names; said seventy-five per cent. to be paid in two, four and six months, from December 15," the contract to take effect "provided all merchandise indebtedness accept the same settlement," is an agreement on the part of a creditor, who has sold the debtor merchandise, to compromise the whole claim set against his name, and rests upon sufficient consideration.

Creditors signed an agreement "to accept seventy-five per cent. of the amount of indebtedness as set against our respective names; said seventy-five per cent. to be paid in two, four and six months, from December 15," the contract to take effect "provided all merchandise indebtedness accept the same settlement." A., one of the creditors, held three notes of the debtor, two of which he had previously sold, taken back under false representations by the purchaser, and at the time he signed the above agreement was, with the knowledge of the debtor, endeavoring to force the purchaser to take the notes back, which was done before December 15. *Held*, in an action by A. upon the note not sold, that A. not being in possession or having control of the two notes sold, the debtor was not obliged as to them to tender the settlement notes. *Held*, also, as to the note in suit, that the debtor was not obliged to tender a settlement note of seventy-five per cent. on that note after the transfer of the other two notes, which the debtor had paid to the purchaser. *Held*, also, that evidence of conversations, tending to show the understanding of parties as to the notes sold, prior to the execution of the agreement, was not admissible to vary the written contract.

CONTRACT by Isaac Farrington and John G. White, doing business under the firm name of the Eagle Woollen Mills, upon a promissory note for $2236.82 dated November 7, 1872, and made by the defendants payable to their own order and indorsed by them. At the trial in the Superior Court, before *Pitman*, J., without a jury, the following facts appeared:

The plaintiffs sold the defendants merchandise, for which, on November 7, 1872, they received three notes, signed and indorsed by the defendants, each payable in six months from its date: one

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dated October 25, for $2236.82; one dated November 1, for $2236.84; and the third the note in suit. On Saturday, November 9, the plaintiff sold the first two of these notes to one Smith, a note broker, and received his check for their price. That night the great fire in Boston occurred. On Monday following this check was presented but was not paid; and one of the plaintiffs accordingly visited Smith, who informed him that he was unable to pay his check, but that he had heard Hodgdon say that morning that he should pay all his debts in full and not ask for any favors. The plaintiffs, believing this statement, were thereby induced to take the notes back and return Smith's check. The next day they learned from Hodgdon that this statement was not true; that the conversation never occurred; and that he should have to compromise with his creditors. They thereupon demanded of Smith that he should take the notes back; and, after several interviews, succeeded in forcing him to do so on December 6.

On November 18, the following agreement was drawn up for signature by the creditors of the defendants, and about a week thereafter was signed for the plaintiffs by White:

"Boston, November 18, 1872. We, the undersigned creditors of Messrs. D. M. Hodgdon & Co., agree to accept (75%) seventy-five per cent. of the amount of indebtedness as set against our respective names, said 75% to be paid in two, four & six months from December 15th, with interest at 7% per annum in notes of said D. M. Hodgdon & Co. The amount due in trust amounting to thirteen thousand dollars to be also extended with the merchandise indebtedness, and provided all merchandise indebtedness accept the same settlement. Eagle Woollen Mills by John G. White, Tr., $6710.48." The defendants learned that the two notes had been sold to Smith before the fire, and that the plaintiffs had been induced on Monday, by false representations, to take them back, within a day or two after the fire, and before the compromise paper was drawn up, and knew that the plaintiffs were making efforts to get Smith to take back the notes. Whether they knew that the plaintiffs expected to succeed was in dispute.

At the trial the plaintiffs offered the note in suit; the signature and indorsement were admitted; they proved that the defendants were partners, and rested. The defendants then offered

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the agreement. The plaintiffs objected to the competency of the paper, but the judge overruled the objection and admitted it, to which the plaintiffs excepted. It was admitted that the notes, which, by the terms of the agreement the defendants were to give in settlement of their debts, were never given or tendered to the plaintiffs.

The judge found as facts that the figures set against the business name of the plaintiffs on the agreement were so placed by them to represent the aggregate indebtedness of the defendants on the three notes; that sometime before December 15, 1872, and after signing the agreement, the plaintiffs had parted with the ownership and possession of two of the notes, and so notified the defendants; that the holder of the notes insisted on payment in full, and that the defendants were compelled to pay the same at maturity to save suit, and their property from attachment; that they had notified the plaintiffs beforehand that they should be compelled so to do unless the plaintiffs protected them; that the defendants had always been ready to give the settlement notes provided for in the agreement, if the three notes were surrendered by the plaintiffs, but that they had always refused to give a settlement note for the one now in suit unless they were protected against the other two; that when the note in suit matured, one of the defendants called on the plaintiffs and offered to pay "the difference between the amount that had been paid by the defendants on the first two notes, and seventy-five per cent. of the whole indebtedness on the three notes," which was refused; and that, two days after, a formal legal tender was made of $559.20, as and for the balance due upon such an adjustment, which was also refused.

The judge found that this was not a correct legal computation upon the defendants' theory. But no question appeared to have arisen between the parties, except the principal one in the case. The judge also found that the agreement had been signed by most of the creditors before the plaintiffs signed; that it was executed by all the other creditors, and that, except as to the plaintiffs, all of its terms and provisions had been fully complied with by the parties thereto.

The plaintiffs offered evidence of conversations between them and their agent on the one part, and the defendants on the other,

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tending to show the understanding of the parties as to the two notes aforesaid, and their oral agreements; but the judge excluded all such evidence of conversations prior to the execution of the agreement as inadmissible to vary a written contract. The defendants made an offer of judgment for $559.20.

The plaintiffs asked the judge to rule: "1. That the agreement on which the defendants relied was not a release but simply a contract to extend the time for the payment of a part of the debts, and therefore was no defence to this action; but if valid at all, was only valid as supporting an action for a breach of this contract.

"2. That if it was an agreement to receive a part of the debts for the whole, it was without consideration and was void.

"3. That at most it was a contract to release the defendants from their original debts upon their giving the plaintiffs certain notes specified in the agreement, and that, it being admitted that these notes were never given or tendered, the agreement was no defence.

"4. That there was no evidence of a waiver of performance or tender by the plaintiffs.

"5. That the three notes were three separate contracts, and that the defendants were bound to give or tender the notes called for by the agreement for seventy-five per cent. of each note, and that as this had not been done there was no defence to the note in suit."

The judge refused so to rule, and did rule: "That the contract was supported by a sufficient consideration; that it was an agreement to release the defendants by the substitution of a new contract which the agreement specified; that the obligation to give the notes therein specified was not severable; that the defendants were not bound to give any new notes without the surrender of all the old ones; and that, upon the facts found, the acts of the plaintiffs had rendered it unnecessary for the defendants to do anything further to entitle them to the benefit of said composition agreement."

The defendants made no question as to the right of the plaintiffs to recover in this form of action the balance of indebtedness, whether on notes or otherwise; and the judge accordingly found for the plaintiffs in the sum of $717.63 only, and ordered judgment accordingly

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To all these rulings and refusals to rule, the plaintiffs alleged exceptions.

M. Storey, for the plaintiffs.

E. Avery & G. M. Hobbs, for the defendants, were not called upon.

DEVENS, J. The plaintiffs contend that the agreement signed by them is to be construed as one to receive payment of a certain portion of their debts in a particular manner, while it did not affect the remaining portion thereof, and therefore that such portion was to be paid in the ordinary manner, and upon the terms on which the debts were originally contracted. It does not admit of this construction. The party signing agreed to "accept" seventy-five per cent. of the indebtedness to him which was to be paid in a manner specified, and this implied that the sum provided for was to be received instead of the full debt. The contract was also to take effect "provided all merchandise indebtedness accept the same settlement," and thus distinctly recognizes that the proposed transaction is a "settlement" of the plaintiffs' claims.

This agreement rested also upon sufficient consideration, if it was completed and became binding, by the fact that other creditors became parties thereto, because it became part of a composition by which the creditors stipulated mutually to release a part of their claims to their common debtor, and the rights and interests of all had become involved in the arrangement. *Perkins* v. *Lockwood*, 100 Mass. 249, and cases cited. If the defendants have since done all which by this agreement to release them from their original indebtedness, by the substitution of a new contract therein specified, they were bound to do, they are now entitled to avail themselves of it in defence to a suit brought upon one of the original notes.

It is argued that there was no tender of the notes proposed to be given in settlement, without which the transaction would be a mere executory agreement, and further, that there was no evidence upon which the court could properly find such a waiver of tender as would excuse this failure. It appears, however, that before December 15, at which date the interest upon the proposed new notes was to commence, the ownership and the possession of two of the three notes, which the plaintiff had assumed to settle,

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had been transferred to Smith, and that Smith was then in a position to enforce payment of them in full, and subsequently did so; and further, that the defendants have always been ready to give the settlement notes, if the three notes which constituted the claim of the plaintiffs were surrendered to them, or if they could be protected against the effect of this transfer to Smith. The law does not require idle and useless ceremonies. *Newcomb* v. *Brackett*, 16 Mass. 161. *Webster* v. *Coffin*, 14 Mass. 196. *Clark* v. *Moody*, 17 Mass. 145. *Buttrick* v. *Holden*, 8 Cush. 233. When, therefore, the plaintiffs had rendered it impossible on their own part to surrender the notes included in the claim they had agreed to release, it must be deemed that by so doing they waived the tender to them of the settlement notes. If one binds himself to do acts which he afterwards renders himself unable to perform, he thereby dispenses with the performance of conditions precedent to such acts. *Mayne's case*, 5 Rep. 20 *b*.

Nor were the defendants under any obligation to tender a settlement note of seventy-five per cent. on the note now in suit, after this transfer. To have compelled them to do this would have compelled them to pay much more than by their agreement they were bound to do. They were willing always to pay the difference between the amount that had been paid by the defendants on the first two notes, and seventy-five per cent. on the whole indebtedness, which was refused. The contract of the plaintiffs was an entire one; they had treated their whole claim as but a single debt, although in fact it was made up of three notes; and the court correctly ruled that the obligation to give the notes in settlement was not severable.

The evidence of conversations, tending to show the understanding of parties as to the Smith notes prior to the execution of the agreement, was rightly excluded as inadmissible to vary the written contract. Even if it was known to the defendants that the plaintiffs were endeavoring to induce Smith to take these notes under their alleged sale, it was competent for them by the written agreement to contract that the defendants should be released from them, on compliance with the terms therein prescribed.

As the defendants make no question as to the right of the plaintiffs to recover in this action the balance of the indebtedness,

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after deducting from the seventy-five per cent. on the whole claim the balance due after payment of the Smith notes, no question as to the form of the action need be considered.

Exceptions overruled.

HENRY E. TURNER & others *vs.* WILLIAM T. WENTWORTH & others.

Suffolk. Nov. 10, 1875. — Jan. 11, 1876. ENDICOTT & LORD, JJ., absent.

Upon the trial of a petition to enforce a mechanic's lien, the question whether the certificate required by the Gen. Sts. *c.* 150, was filed within thirty days after the work was completed or materials furnished under the contract, or whether work was done within the thirty days colorably, for the purpose of reviving the lien, is a question of fact, upon which the finding of the judge, who tries the case without a jury, is final.

On the trial of a petition to enforce a mechanic's lien, the question whether labor was performed and materials furnished by the petitioner upon each of three houses in a block under an entire contract, or under separate contracts, is a question of fact, upon which the finding of the judge, who tries the case without a jury, is final.

On the trial of a petition to enforce a mechanic's lien, the petitioner claimed a lien for furnaces and ranges furnished by him. The judge who tried the case without a jury found that the petitioner was entitled to the lien *Held*, that the question was one of mixed fact and law: that if the transaction between the petitioner and the owner of the buildings was merely a sale of the furnaces and ranges as personal property, there would be no lien; but if by the contract the furnaces and ranges were to be furnished as parts of the houses, and they were in fact so applied, there would be a lien; and that, it not appearing that the judge erred in applying these principles of law, exceptions alleged to his finding could not be sustained.

PETITION to enforce a lien under the Gen. Sts. *c.* 150, for labor performed and materials furnished, in the construction of a block of three houses in Boston. Trial in the Superior Court, before *Putnam*, J., without a jury, who allowed a bill of exceptions in substance as follows:

The petitioners were dealers in furnaces and ranges. The respondent Wentworth was the owner of the land, and the builder of the three houses in a block in Clarendon Street, in Boston. In February, 1870, the petitioners contracted orally with Wentworth to furnish three portable furnaces, pipes and registers, com-

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plete, and three ranges, with utensils complete, one for each house, for the price of $285 for each house. Wentworth was to furnish brick, and do the carpenter and mason work necessary in putting in materials furnished by the petitioners. These furnaces were those usually known as portable furnaces, and were delivered at the houses by the petitioners, the builder constructing the brick work or base on which each was set. The evidence was that each furnace was set in mortar upon the brick work, with an air-chamber between the furnace and the foundation, in such a way that it could not be removed without disturbing or breaking the connection. With the exception of what the petitioners did on March 15, following, hereinafter referred to, said furnaces and ranges had been put into the houses; and some extra work occasioned by changes ordered by the builder was done on or before June 8, 1870; and the charges were made therefor on June 8, by the petitioners.

On March 15, 1871, one of the houses being occupied by a tenant, and the other respondents having taken mortgages, as set forth in the petition, which were all recorded August 19, 1870, the petitioners were requested by Wentworth to complete the jobs, and accordingly sent two or three metallic registers for the furnace in each of said houses, and the pots, kettles and other utensils for each of said ranges, together with the lids thereof, also four or five short pieces of tin hot-air pipe, to be connected with the furnaces. As originally contemplated, the metallic registers were to rest horizontally in stones set in the floor; but, by the changes made on or before June 8, at Wentworth's request, one of these stones in each house was transferred to a partition, and set in an upright position. No charge was made for this change, the petitioners testifying that Wentworth had a right to have such changes made. When the registers were carried there on March 15, it became necessary to drill holes in the stones set in the partition, and to insert some screws to retain the registers in their places. This work was done on that day. In the house occupied by the tenant, two registers only were furnished, and the work of setting a register in an upright stone, as before described, by drilling holes and inserting screws, was all the work done in that house on that day, except that of leaving the utensils for the range

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The certificate of a lien was filed on April 14, 1871. At the hearing, the original petition appeared to have been lost, and could not be found, and the hearing proceeded against the respondents' exceptions, upon a certified copy, the judge reserving the rights of the respondents.

The respondents contended: "1. That the materials furnished and work performed by the petitioners were completed on June 8, 1870, as represented in their several bills of particulars, and that the petitioners were bound by their representations in said bills of particulars, and estopped thereby to claim for what was done in March following.

"2. That the materials furnished, and labor performed in connection therewith, did not come within the provisions of the Gen Sts. *c.* 150.

"3. That what was done on March 15, 1871, the thirtieth day preceding the filing of the certificate of lien, could not be regarded as ceasing to labor on or furnish materials for a building or structure within the provisions of § 5 of said statute.

"4. That as the contract was to furnish certain articles at a specified price for each of the several houses, as set forth in each of three bills of particulars, the prayer of the petition 'that all the land and buildings may be sold,' could not be granted."

"5. That no decree or order could be made in the absence of the original petition."

Upon the issues of fact and of law, the findings of the judge were as follows:

"1. That the petitioners furnished both labor and materials upon all of the houses in question, as late as the 15th of March, 1871, and so that the certificate was seasonably filed, and the action seasonably brought.

"2. That the contract was entire and indivisible to do work and furnish materials upon an entire estate, that is, upon the block of three houses, at $285 per house, and that the lien attaches to the whole estate.

"3. That the mortgagees take their title subject to the lien.

"4. That the furnaces and ranges were fixtures, and so that the petitioners are entitled to their lien.

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"5. That the petitioners are entitled to establish their lien, and said lien is established for the sum of $805.95 and interest from the date of filing of the petition."

To the foregoing rulings, opinions and findings as matter of law, the respondents alleged exceptions.

C. R. Train & A. Russ, for the respondents having mortgages on the land. 1. The fundamental idea running through all the statutes for the enforcement of this class of liens is the equity of the mechanic to be paid for his labor and materials by subjecting to a lien the identical structure, with the land to which it is annexed, which structure he has contributed to bring into existence; so it has been held that the lien applies only to real estate. *Belding* v. *Cushing*, 1 Gray, 576.

2. The statute should be construed according to the mischief to be remedied, which was that by the common law the mechanic, who erected, constructed or repaired fixed or stationary machinery, structures or buildings, was without that safe security for compensation which a specific lien on the machinery, the structure or building would afford. But with reference to movable machines, implements or chattels, the common law affords ample and complete security to the mechanic by leaving in him the right of property if he chooses to make his sale upon the appropriate stipulations or conditions, or he may retain the possession thereof. Phillips on Mechanics' Liens, § 178. *New England Car Spring Co.* v. *Baltimore & Ohio Railroad*, 11 Md. 81, 90, 91.

3. The case finds that the petitioners were dealers in ranges and furnaces; that the materials they furnished in this instance were portable furnaces. These are personal chattels, and the nearest they get to the realty is when they are impressed with the character of removable fixtures, not necessary to the inheritance, but convenient and useful to the tenant. The Supreme Court of Maine, in construing the language of a statute identical with ours, say, that to come within this provision the materials must be so applied as to constitute a part of the building, and not be merely a fixture for its more convenient use. *Lambard* v. *Pike*, 33 Maine, 141. *Truesdell* v. *Gay*, 13 Gray, 311, 312. Phillips on Mechanics' Liens, § 175.

In February, 1870, the petitioners contracted to furnish these articles; they were put into the houses, and some extra work

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occasioned thereby was performed on or before June 8, 1870; the charges were made therefor on June 8, 1870; no charge is subsequently made. The learned judge therefore erred in law when he found as a fact that the petitioners furnished labor and materials upon these houses as late as March 15, 1871. A trivial addition at the expiration of a period of ten months, too insignificant to be regarded worthy of a charge, cannot bring to life a defunct lien. The petitioners show a completion of their contract on June 8; they show all the extra work considered worthy of a charge to have been then performed and charged. They made their record, completed their charges; they made no subsequent or additional charge; no debt was subsequently created, and it is to secure a debt that they claim a lien. The sale by the petitioners of these portable furnaces and utensils did not entitle them to a lien, for the case finds that Wentworth, who was the owner of the land and buildings, and one of these respondents, was to furnish brick and perform all the carpenter and mason work used in connection therewith. The case also finds that on June 8, 1870, the petitioners charged for some extra work not contemplated in their contract of sale, occasioned by some changes ordered by the builder; in consequence of these changes a trifling amount of mechanical work, not considered worthy of a charge, was performed on March 15, 1871. This labor performed on March 15, 1871, was connected only with the extra work made the subject of extra charge in the petitioners' bill of particulars, and so could draw after it only that extra work; and if a lien can be maintained at all, it must be for the amount of this extra work which was independent of the sale of furnaces and ranges. As against these mortgagees, who took their title after the apparent completion of these buildings, these petitioners ought to be estopped by the record in their own books, the completion of their charges and accounts made up to June 8, 1870; they obviously regarded the work as completed; and some trifling changes which they considered the builder as entitled to have made without charge, and the delivery of a few utensils, cannot, under any just construction of the statute, entitle them to supersede the title of these mortgagees.

H. D. Hyde & *M. F. Dickinson, Jr.*, for the petitioners, were not called upon.

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MORTON, J. In cases which are tried by the court without a jury, each party has the right to except to the decisions and rulings of the court upon matters of law, in the same manner and with the same effect as upon trial by jury. But the findings of the court upon matters of fact are conclusive to the same extent as the verdict of a jury, and this court has not the power to revise such findings upon a bill of exceptions. In the case at bar, the exceptions alleged by the respondents are rather of the nature of objections to the findings of the presiding judge as to matters of fact, than of exceptions to his decisions and rulings in matters of law.

1. The question whether the certificate filed in the office of the clerk of the city was seasonably filed is a question of fact. The statute provides that the lien shall be dissolved, unless the person claiming it files the certificate "within thirty days after he ceases to labor on or furnish labor or materials for" the building upon which he claims a lien. The evidence showed that the petitioners did some labor, and furnished some materials used, in the erection of the building, within the thirty days. If this was done in good faith, for the purpose of completing their contract, and not colorably in order to revive their lien, the thirty days would begin to run from the time they thus performed labor and furnished materials. This presented purely a question of fact, upon which the finding of the presiding judge is conclusive.

2. The petitioners claim a lien for three furnaces and three ranges set by them, one in each house, in a block of three houses. If the labor and materials for which they claim a lien were performed and furnished under an entire contract, a lien attached in their favor to the entire estate. *Wall* v. *Robinson*, 115 Mass. 429. *Worthley* v. *Emerson*, 116 Mass. 374. The finding of the judge who heard the case, "that the contract was entire and indivisible to do work and furnish materials upon an entire estate," cannot be revised by this court.

3. The only other question argued to us is as to the correctness of the finding of the presiding judge that the petitioners were entitled to a lien for the furnaces and ranges furnished by them. The question before him upon this subject was a mixed question of law and fact. If the transaction between the petitioners and the owner of the building was merely a sale by the former of the

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furnaces and ranges as personal property, they would have no lien upon the building in which they were put by the purchaser. But if by the contract of the parties the furnaces and ranges were to be furnished as parts of the several houses in which they were put; if it was the intention and understanding that they should be, and they were in fact, applied so as to constitute parts of the buildings, the petitioners would have a lien for them. They would be, within the statute, materials furnished and used in the erection of the buildings. There was competent evidence which would justify the finding that they were furnished under the contract, as parts of the buildings, and that they were annexed to and became parts of the realty, and there is nothing in the bill of exceptions to show that the presiding judge did not correctly apply the rules of law to the facts proved. His finding, therefore, upon this question is conclusive.

4. The exception to the ruling that the hearing might proceed upon a certified copy of the petition, the original having been lost, was not pressed at the argument, and we consider it as waived. *Exceptions overruled.*

CARLYLE PETERSILEA *vs.* AMOS STONE.

Suffolk. Nov. 15, 1875. — Jan. 11, 1876. ENDICOTT & LORD, JJ., absent.

Service of notice of intention to take the poor debtor's oath was made by a person who had been duly appointed and qualified as a constable of the city of Boston, and had held the office for several consecutive years, but the term of whose appointment had expired at the time of service. He was generally known as a constable, and at the time was notoriously acting as such, having an office in Boston, on the door of which was his name with the addition "constable." The debtor delivered the notice to him believing him to be a constable. *Held*, that he was an officer *de facto*, and that the validity of the service could not be collaterally called in question, in an action on the recognizance given by the poor debtor.

CONTRACT upon a poor debtor's recognizance entered into by Abraham B. Shedd, as principal, and the defendant as surety. The case was submitted to the Superior Court, and after judgment for the defendant, to this court on appeal, or on agreed statement of facts in substance as follows:

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It is agreed that the defendant entered into the recognizance declared on, and that all the proceedings had upon the application of the judgment debtor, Shedd, for the benefit of the law for the relief of poor debtors, were valid and regular, except in the service upon the plaintiff of the notice of Shedd's desire to take the oath provided for in such cases, the plaintiff contending that the service of the notice by Ephraim W. Farr, describing himself as a constable of the city of Boston, was not sufficient. The question of the sufficiency of service by Farr is the only one at issue in this case.

It is agreed that Farr was duly nominated and confirmed as a constable of the city of Boston, and received a warrant or certificate, gave a bond, as required by law, in order to enable him to serve civil process, and was duly sworn and qualified on October 16, 1873, the bond reciting that Farr had been appointed a constable of the city "for one year from September 29, 1873, and until another be appointed in his place," and entered upon the discharge of his duties as constable.

At the general appointment of constables, which is made annually, on September 28, 1874, Farr was nominated by the mayor, but failed of confirmation at the time of general confirmation, but was afterwards confirmed on November 9, 1874, gave a bond as aforesaid, and was duly sworn and qualified on November 30, 1874, his certificate bearing date November 9, 1874. The notice referred to above was seasonably served on October 5, 1874.

Farr had been for several consecutive years a constable of said city, duly qualified to serve, and serving, civil process, and was generally known as such, and on that day, before, at the time of, and after the service, he held himself out and was notoriously acting as such constable, as he had done since September 29, 1873, having an office in Boston, and on the door thereof his name with the addition of "constable." Shedd delivered the notice to Farr for service at his office, and then and until long after such service believed that Farr was duly qualified as such constable to serve the notice. Farr arrested Shedd on the execution, in pursuance whereof the recognizance was taken, and at the time of receiving and serving said notice held said execution as such officer.

If admissible, the plaintiff can prove that Farr knew that he had failed of confirmation as constable on September 28; but it

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is agreed that he and Shedd both acted in good faith, both believing that Farr was duly authorized to serve said notice.

The number of constables for the city of Boston varies from year to year, and the time for their appointment is not fixed, the number of constables and the time for their appointment and confirmation being regulated solely by the discretion of the mayor and aldermen. Appointments and confirmations were in fact made on several different days between September 28 and December 31, 1874, and on October 5, 1874, there was a large number of constables duly appointed and qualified to serve civil process in said Boston.

If the service of said process was sufficient, judgment was to be entered for the defendant; otherwise, for the plaintiff.

H. F. Buswell, for the plaintiff.

C. Robinson, Jr., for the defendant.

DEVENS, J. If Farr was an officer *de facto*, the validity of the service by him of the notice to take the poor debtor's oath cannot be inquired into collaterally. *Coolidge* v. *Brigham*, 1 Allen, 333. In order to show that he was not, the plaintiff relies upon the statement of Bigelow, C. J., in *Fitchburg Railroad* v. *Grand Junction Railroad*, 1 Allen, 552, 557, that "the exact distinction between an usurper or intruder, and an officer *de facto*, is this: the former has no color of title to the office; the latter has, by virtue of some appointment or election." If this were intended as a general definition of an officer *de facto*, it would be incomplete, but the inquiry there presented to the court was as to the validity of certain acts done by one who acted under a commission *primâ facie* valid, and issued by an authority apparently empowered to invest him with the legal rights and powers of the office to which he was appointed, and it is to be limited to the case then before the court. The reason of public policy, upon which it is held that the acts of an officer *de facto* are not to be called in question collaterally, but are valid as to third persons, may apply even to the case where such officer is a usurper and intruder. This principle has been applied in England to the most important office; after Edward IV. obtained the crown, the kings of the line of Lancaster, who had preceded him, were spoken of as "*nuper de facto et non de jure reges Angliæ*, but although Henry VI. had been declared a usurper by act of Parliament, attempts against his

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authority (not having been in aid of the rightful king) were capitally punished. 1 Bl. Com. 204. 4 Bl. Com. 77. Third persons, from the nature of the case, cannot always investigate the right of one assuming to hold an important office, even so far as to see that he has color of title to it by virtue of some appointment or election. If they see him publicly exercising its authority, if they ascertain that this is generally acquiesced in, they are entitled to treat him as such officer, and, if they employ him as such, should not be subjected to the danger of having his acts collaterally called in question. *Brown* v. *Lunt*, 37 Maine, 423. *State* v. *Carroll*, 38 Conn. 449. If the party thus recognizing the officer *de facto* were aware that such officer had some appointment or election, it would strengthen his belief, but without this he would be justified in believing that an authority publicly exercised and assented to was rightfully assumed. *Wilcox* v. *Smith*, 5 Wend. 231. The definition of an officer *de facto*, as given by Lord Ellenborough, in *The King* v. *Bedford Level*, 6 East, 356, which he generalizes from that of Lord Holt, in *Parker* v. *Kett*, 1 Ld. Raym. 658, 660, is "one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law," and the above suggestions are in accordance with this definition. In the opinion in *People* v. *Collins*, 7 Johns. 549, relied on by the plaintiff, it is held that the commissioners, whose acts were there in question, were officers *de facto*, as they came into their office by color of title; and it is added that "it is a well settled principle of law that the acts of such persons are valid when they concern the public, or the rights of third persons who have an interest in the act done."

The principle, upon which the acts of officers *de facto* have been held valid, has sometimes been extended, so far as to protect them, under certain circumstances, when they have been directly proceeded against. The question then presented is not the same as that where the rights of third persons only are involved, and in such cases it would not be sufficient that they had publicly exercised such office, but they might properly be called upon to show they did so by virtue of some appointment or election, which they had a right to believe valid, even if it were otherwise. *State* v *Carroll*, *ubi supra*.

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It was shown in the present case that Farr was "notoriously acting" as constable, having an office in Boston, and upon its door his name with the addition of the word "constable;" and as to third persons he must be deemed an officer *de facto*.

Were it necessary in order to maintain his proceeding to show that he had color of title by some appointment or election, it would not perhaps be difficult to do so. Farr had originally a proper appointment, and even if he, who wrongfully holds over after the term for which he is appointed has expired, and this is known to him, cannot be said to hold by color of title, there are many cases where this expiration cannot be clearly ascertained. He who thus continues to hold his office erroneously but under a claim of right honestly and reasonably made has color of title from his original appointment or election. *Crew* v. *Vernon*, Cro. Car. 97. These considerations have rendered it unnecessary to determine whether Farr was an officer *de jure*.

Judgment affirmed.

WILLIAM FUNCHEON *vs.* A. W. HARVEY & another.

Suffolk. Nov. 21, 1874.—Jan. 29, 1876. DEVENS & LORD, JJ., absent.

In an action to recover the freight due under a charter party, by the terms of which the plaintiff is to take a cargo on board with all convenient speed, and proceed direct to the port of delivery, and the declaration alleges that the plaintiff performed all things in the charter contained on his part to be performed, and the cargo is delivered in a damaged condition, and the issue is whether the vessel unnecessarily delayed in her port of departure before sailing and deviated upon the voyage, the burden of proof is upon the plaintiff to show that he had complied with the terms of the charter party on his part to be performed.

CONTRACT to recover the freight due under a charter party, excepting loss by perils of the seas. The other terms of the charter party and the pleadings in the case appear in the opinion.

At the trial in the Superior Court, before *Pitman*, J., the plaintiff introduced evidence tending to show that he took on board at St. John's, Newfoundland, in good condition, a cargo of Newfoundland dry codfish packed in drums, and proceeded with it thence to Havana, Cuba; that the loading was completed on February 17, and the vessel sailed on February 25, and arrived

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at Havana on May 21, following, and there delivered the fish *in specie* to the consignees; that there was no appearance of wet or any injury whatever by sea-damage on the drums or cases, but that the fish appeared to be heated and were damaged, and that the consignees at Havana refused to pay the freight on account of the damage to cargo.

The defendants introduced evidence tending to show that the fish was in excellent condition when shipped, and on arrival was nearly destroyed by heating and decay, and of little or no value, and was sold on the wharf at auction for manure or bait, at great loss; that the vessel unnecessarily delayed in St. John's before sailing, and on the voyage deviated unnecessarily from the direct and usual route, and was so negligently and unskilfully navigated and managed as greatly and unnecessarily to have impeded and prolonged the voyage, and thereby caused the injury to the cargo.

The defendants contended that the burden of proof was on the plaintiff to show that he had performed the stipulated voyage by the proper route and in due season, and that the ship started for and was navigated to her destined port in the usual way, without unnecessary delay or deviation, and requested the judge so to rule. The judge declined so to rule, so far as related to the burden of proof, but did rule that the liability of the cargo to injury by heating and decay was a peril of the sea, and as such excepted in the charter party, and the plaintiff was not responsible for it, unless such result was due to unskilful navigation, or want of diligence in the voyage, or some negligence or misconduct of the master or mariners; and that the burden of proof was on the defendants to show this, and that negligence had made this excepted peril operative.

The jury returned a verdict for the plaintiff; and the defendants alleged exceptions to the above ruling.

C. T. Russell, for the defendants.

O. W. Holmes, Jr. & W. A. Munroe, for the plaintiff. 1. It is settled that freight is earned by the delivery of the cargo *in specie*. *Libby* v. *Gage*, 14 Allen, 261, 263. And although the goods have been injured by the negligence of the carrier, the rule is the same. *Davidson* v. *Gwynne*, 12 East, 381. *Gibson* v. *Sturge*, 10 Exch. 622, 632. *Dakin* v. *Oxley*, 15 C. B. N. S. 646, 664. *Garrett* v. *Melhuish*, 4 Jur. N. S. 943. 1 Pars. Ship. 206 n. 1. The claim

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for damage to cargo is a counter claim, which in England cannot be set off, but must be established in a separate action. *Dakin* v. *Oxley*, *ubi supra*. The principle as to the burden of proof is not affected by allowing the defendant to prove his counter claim in the action for freight. In the language of Mr. Justice Willes, "This allowance of set-off affects procedure only." *Dakin* v. *Oxley*, *ubi supra*.

2. This is therefore to be considered as an action on the charter party by Harvey & Co. for the heating and decay of perishable articles inside their casks, alleged to be caused by the undue length of the voyage, which is attributed to the master's bad seamanship. In such a case the burden is on Harvey to prove that the master was in fault. No bad stowage is alleged, and no question as to stowage was raised; there was no pretence that the casks did not remain whole; and the defendants themselves attribute the loss to heating and decay. The proximate injury was the decay of the fish inside the casks, a thing for which even common carriers are not responsible unless caused by their fault. The only ground of charging the master would be that the immediate causes of the loss would not have time to work but for the length of the voyage, a thing for which carriers are not generally responsible, and that this was due to the bad seamanship of the master. But all the cases are agreed that when the proximate injury is of a kind for which carriers are not liable, the burden is on the owner of the goods to show that it was occasioned by the carriers' fault. *Clark* v. *Barnwell*, 12 How. 272, 280, 282. *Lamb* v. *Parkman*, 1 Sprague, 343, 353, 354. *The Invincible*, 1 Lowell, 225. *Transportation Co.* v. *Downer*, 11 Wall. 129. *Czech* v. *General Steam Navigation Co.* L. R. 3 C. P. 14, 19. *Ohrloff* v. *Briscall*, L. R. 1 P. C. 231, 238. *The Cleveland*, Newb. 221.

ENDICOTT, J. The charter party requires that the plaintiff "shall with all convenient speed take on board" the cargo of codfish, "and being so loaded proceed therewith to a port either in Cuba or Porto Rico, direct, and there deliver the same." The plaintiff alleges in his declaration that he did so, "and proceeded direct to a port in Cuba, namely, Havana," and that he had performed all things in the charter contained on his part to be performed. The answer denies each and every allegation of the declaration, except the payment by the defendant of a portion of

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the freight. The further allegations and denials of the answer do not set up any defence not open under the general denial. In various forms the answer denies that the plaintiff performed that stipulation of the charter party, which required him with all convenient speed to take on board the cargo, and proceed with it to Havana direct; and that by reason of the failure of the plaintiff so to do, the codfish were wholly destroyed. One issue therefore directly raised upon the pleadings was whether the plaintiff had performed his contract in this particular; the evidence on both sides, as reported, was directed to that issue, and upon that issue the burden was upon the plaintiff. He was bound to prove that he had performed that stipulation, as well as all other stipulations of the charter party. The instruction requested should therefore have been given; it related only to that provision of the charter party.

Upon the question, whether the failure to perform that stipulation (if the jury should find it was not performed) caused the injury and destruction of the goods, the defendant asked no instructions. As the presiding judge refused to give the instructions asked for, so far as related to the burden of proof, it is unnecessary to consider the rulings actually given.

Exceptions sustained.

MARGARET TIGHE *vs.* CITY OF LOWELL.

Middlesex. January 12.—13, 1876. COLT & ENDICOTT, JJ., absent.

One who, being upon a highway merely for play, meets with an injury occasioned by a defect therein, cannot maintain an action for damages therefor against the city or town bound to keep the highway in repair for travellers.

TORT for personal injuries occasioned by a defect in a public street, in the defendant city. The alleged defect was an open ditch excavated for a sewer, into which the plaintiff fell and broke her arm.

At the trial in the Superior Court, before *Pitman*, J., the plaintiff, who was six years old at the time of the accident, testified that she did not remember much about getting hurt; that she was standing by the side of the sewer and fell in; that she was

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playing tag with another little girl; that she went out from her mother's house, near by, to play with this little girl, and that she was not going anywhere else.

The judge ruled that there was no evidence which would authorize the jury to find that the plaintiff was a traveller upon the highway at the time of the accident, and directed them to return a verdict for the defendant; and after verdict reported the case for the consideration of this court. If upon the evidence the plaintiff was entitled to go to the jury, the verdict was to be set aside; otherwise judgment was to be rendered thereon.

C. A. F. Swan, for the plaintiff, contended that the case should have been submitted to the jury; and cited *Stickney* v. *Salem*, 8 Allen, 374; *Hamilton* v. *Boston*, 14 Allen, 475, 483.

G. F. Richardson, for the defendant, was not called upon.

By the Court. The evidence at the trial showed that the plaintiff was using the highway as a play ground, and the case is governed by *Blodgett* v. *Boston*, 8 Allen, 237.

Exceptions overruled.

Alanson Folsom *vs.* William H. Clemence.

Middlesex. January 12. — 13, 1876. Colt & Endicott, JJ., absent.

After judgment for the conversion of certain chattels, an action cannot be maintained for the conversion of other chattels taken by the same act, but accidentally omitted in the former action.

Tort for the conversion of certain furniture and store fixtures. Writ dated September 20, 1873.

At the trial in the Superior Court, before *Pitman*, J., without a jury, it was admitted that the alleged conversion was at the same time and by the same act as that of the stock in trade in the same store, for which the plaintiff had recovered judgment against the defendant in a former action, reported 111 Mass. 273.

The plaintiff offered to prove the same title and facts as in the former action; that the property which was the subject of the present action was not included in the former one, through the accidental omission of the plaintiff's attorney, the mistake not

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being discovered until after judgment; and that, before the payment of the judgment therein, the plaintiff notified the defendant of the omission, and demanded payment for the property omitted. This evidence the judge excluded, and ruled that the plaintiff had but a single cause of action for the taking of all the property, and that the prior action and judgment had exhausted his remedy, and upon this ground gave judgment for the defendant. The plaintiff alleged exceptions.

R. B. Caverly, for the plaintiff.

A. F. Jewett, for the defendant.

BY THE COURT. The taking by one act of several chattels of the same person will not sustain more than one action. The judgment in the first action is a bar to this. *Marble* v. *Keyes*, 9 Gray, 221. *Bennett* v. *Hood*, 1 Allen, 47. *Trask* v. *Hartford & New Haven Railroad*, 2 Allen, 331.

Exceptions overruled.

AARON HUNT, executor, *vs.* THOMAS HUNT.

Middlesex. January 12.—13, 1876. COLT & ENDICOTT, JJ., absent.

In an action by the executor of A. for a bond lent by A. to the defendant, for which A. took a receipt, there was evidence that A. afterward, while sick in bed, made verbally a gift of it to the defendant, without any other delivery of the bond, and promised to return the receipt when he should be able to get it. The judge ruled that, upon the above evidence, as matter of law, there had been no sufficient delivery of the bond to constitute a valid gift, even if such was A.'s intention. *Held*, that this ruling was erroneous; and that the question whether there was such delivery was a matter of fact to be tried.

CONTRACT by the executor of Cyrus Hunt for money had and received by the defendant to the use of the testator, with a count alleging the delivery of a bond of the value of $1000, by the testator to the defendant; a promise on his part to return it; and a demand and refusal. Answer, a general denial.

At the trial in the Superior Court, before *Pitman*, J., without a jury, the plaintiff offered in evidence the following receipt signed by the defendant: "Brighton, Nov. 15, 1871. Rec'd of Cyrus Hunt, bond of one thousand dollars, No. 23,658, which I am to return to him, or its equivalent in currency."

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The defendant contended that the bond in question had been given to him by the plaintiff's testator. It appeared in evidence that he was the half-brother of Cyrus Hunt, who was in the habit of assisting him pecuniarily from time to time; that the bond in question had been lent to him about the time the receipt in evidence was given. The defendant testified that, at the time of the loan, the plaintiff's testator signified his intention of giving the bond in question to him; that afterwards he did give the bond to him; that at the time of the gift the bond was already in the possession of the defendant; that the testator was sick in bed at the time and unable to get the receipt in question, but said that all papers in his possession were to be given up to him if he would come up some day when the testator was able to get them. A minister of the testator's parish also testified that the testator had made inquiries of him concerning the children of the defendant, who had attended school under the witness, and said he intended to do something for the defendant and his children; that the testator afterwards told him that he had provided for the defendant and his children by giving a bond to the defendant. The plaintiff offered evidence tending to show that the testator did not intend a gift.

Upon this evidence, the judge, having found that the bond was originally a loan, ruled that as matter of law there had been no delivery of the bond by the plaintiff's testator to the defendant, sufficient to constitute a valid gift, even if such were proved to have been intended; and found for the plaintiff accordingly; and the defendant alleged exceptions to this ruling.

C. T. Lovering, for the defendant.

J. Rutter, for the plaintiff.

BY THE COURT. The ruling that, even if the testator intended to make a gift to the defendant of the bond in the possession of the latter, the evidence in the case was insufficient as matter of law to prove such delivery as was necessary to constitute a valid gift *inter vivos*, was erroneous. The question whether there was such delivery was a matter of fact, which should have been tried in the court below. ***Exceptions sustained.***

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JOSEPH W. TUFTS *vs.* JAMES C. NEWTON.

Middlesex. January 14. — 20, 1876. COLT & ENDICOTT, JJ., absent.

The time for pleading to a writ of error may be enlarged under the 29th rule of this court.

Under the Gen. Sts. *c.* 115, § 7, a bill of exceptions must be presented to the judge, as well as filed with the clerk, within the time therein specified; and unless so filed the judge is not obliged to allow them.

Whether a judge errs in disallowing a bill of exceptions is a matter of record, and cannot be affected by oral evidence of his reasons.

On a writ of error to reverse a judgment of the Superior Court, the error assigned being the disallowance of exceptions, taken by the plaintiff in error in an action of contract brought against him in that court, because not presented to the judge within the time required by law, whereas, as it was alleged, the record showed that they were presented in time, the question arising on the record is an issue of law, which a single justice of this court cannot try or reserve, but which is within the exclusive jurisdiction of the full court.

WRIT OF ERROR to reverse a judgment of the Superior Court in an action of contract brought by Newton against Tufts. The error assigned was that exceptions taken by Tufts at the trial of that action before the jury were disallowed by the presiding judge, because not presented to him within the time required by law, whereas the record showed that they were presented within the time required by law.

The docket and files of that action (no extended record being produced) showed that the verdict was returned in favor of Newton October 15, 1874; that Tufts filed his bill of exceptions with the clerk October 16, 1874; that the court was in session every week day until October 22, 1874, when *Bacon*, J., made and signed this certificate thereon: "Presented to me October 22, 1874. Disallowed, because these exceptions were not presented to me for allowance within the time required by law, and consent to extend said time was refused by the plaintiff."

Newton did not appear or plead to the writ of error within ten days after the return of the *scire facias*, and Tufts thereupon moved for a default. But *Wells*, J., afterwards, within the term, allowed Newton, against the objection of Tufts, to appear and plead *in nullo est erratum;* and made a report of the case, which stated the facts above set forth, and further stated that Tufts duly saved and alleged exceptions and reduced the same to writ-

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ing, but did not present them to the judge (otherwise than by filing them with the clerk) until October 22, 1874, and that, "if competent evidence in this proceeding, it was admitted that said judge stated orally, as one of the reasons for refusing to allow said exceptions, that they had not been presented to him seasonably, and that he thought he had not the right then to allow them, without the consent of Newton, or to extend the time for the presentation of exceptions to the court, after the three days allowed by statute had expired." The report concluded as follows: "The case having been submitted to me upon the foregoing facts and offer of proof, I thereupon adjudged that said judgment of the Superior Court should be affirmed, and, at the request of the plaintiff in error, report the case for the consideration of the full court."

W. G. Sprague, for the plaintiff in error.

W. S. Stearns, for the defendant in error.

GRAY, C. J. The time for pleading to a writ of error is not fixed by statute, but depends upon the rule of court, which expressly reserves the power to restrict or enlarge the time. Gen. Sts. *c.* 146, §§ 1–10. Rule 29, 104 Mass. 564. The plea was therefore duly filed.

The statute which regulates bills of exceptions clearly requires them, not only to be filed with the clerk, and notified to the other party, but to be presented, within the time specified, to the judge who made the ruling excepted to, and who is to examine the bill and sign with his own hand a certificate allowing or disallowing it. The exceptions in the case at bar not having been presented to the judge within that time, he was not obliged to allow them. Gen. Sts. *c.* 115, §§ 7, 8. *Barstow* v. *Marsh*, 4 Gray, 165. *Sawyer* v. *Yale Iron Works*, 116 Mass. 424, 432. *Commonwealth* v. *Greenlaw*, *ante*, 208.

Whether the judge erred in disallowing the exceptions was a matter of record, and could not be affected by oral evidence of his reasons. *Brown* v. *Bull*, 8 Mass. 211. *Fleming* v. *Clark*, 12 Allen, 191. The question arising upon the record was an issue in law, which a single justice of this court had no authority either to try or to reserve, but which is within the exclusive jurisdiction of the full court. Gen. Sts. *c.* 112, § 5. In the exercise of that jurisdiction, it is ordered that the judgment of the Superior Court be

Affirmed.

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LORING PARKER, executor, *vs.* LEONARD M. PARKER & others.

Middlesex. January 19. — 20, 1876. COLT & ENDICOTT, JJ., absent.

An executor, who has no title as such in the real estate of his testator, and who does not allege that there is any personal estate in his hands for distribution, cannot maintain a bill in equity to obtain the instructions of this court as to the construction of the will of the testator, although the bill alleges, and the fact appears, "that there is and was left by said testator personal estate and lands."

BILL IN EQUITY by one of the executors of the will of Loring Parker, against the heirs at law and legatees of the testator, the first named defendant being also an executor of the will.

The bill alleged that the testator died on July 16, 1873, leaving no widow, and that his will, dated April 18, 1863, was duly admitted to probate on September 16, 1873; that the executors named therein were duly appointed and qualified; that the true construction of the will was doubtful in so many particulars as to need the aid and direction of this court to determine the same, and the duties of the executors concerning the estate of the deceased and the rights and interests of the several parties interested therein; that "there is and was left by said testator personal estate and lands;" that the plaintiff desired the direction of the court "in the following particulars and in any other that may be material to the parties in respect to their interests, property and titles to the estate real and personal of said testator, under the provisions of said will." Then followed three questions in regard to the construction of the will, and a prayer "for such other direction and instruction as to the construction of said will and the rights and estates of the parties under the same as may be proper and necessary."

A copy of the will was annexed. Under the decision of the court it is only material to state that no property was devised or bequeathed to the executors, in their representative capacity.

Hearing before *Morton*, J., who found that the allegations of the bill were true, and reserved the case for the consideration of the full court.

D. S. Richardson & G. F. Richardson, for the plaintiff.

F. A. Worcester, for the defendants.

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THE COURT held that the executor had no title in the real estate, and that it did not appear that there was any personal property in his hands for distribution among the defendants, and that therefore no case was shown for the exercise of the jurisdiction of the court, and *Dismissed the bill.*

INHABITANTS OF WALTHAM *vs.* INHABITANTS OF BROOKLINE.

Middlesex. Jan. 11, 12. — 21, 1876. COLT & ENDICOTT, JJ., absent.

In an action under the Gen. Sts. c. 73, § 25, by a town, for expenses paid for the support of a lunatic committed to a state hospital, against the town where he has a settlement, the plaintiff must show that the lunatic was a pauper at the time the relief was furnished.

MORTON, J. This is an action to recover the amount of a bill paid by the plaintiff to the State Lunatic Hospital at Worcester, for the board, from July 22, 1870, to August 20, 1872, of Stephen W. Adams, a lunatic committed to said hospital on August 10, 1869, and alleged to have his settlement in the defendant town. It appears from the bill of exceptions that "there was no evidence in the case that, before and upon August 10, 1869, Adams was a pauper, nor that he had ever been supported by or received any aid from any place as a pauper; nor that at or before his commitment, or after that time, he was a person in distress needing immediate relief."

The burden of proof was upon the plaintiff to show that, at the time the relief was furnished, Adams was a pauper; and as there was no evidence of this fact, the court should have ruled, as requested by the defendant, that the plaintiff could not maintain this action. The statute provides that "every city and town paying expenses for the support or removal of a lunatic committed to either hospital, shall have like rights and remedies to recover the full amount thereof, with interest and cost, of the place of his settlement, as if such expenses had been incurred in the ordinary support of the lunatic; and the lunatic, if of sufficient ability to pay the same, and any kindred obligated by law to maintain him, shall be liable for all such expenses paid by any city or town in either case." Gen. Sts. *c.* 73, § 25.

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Although the word "pauper" is not used in this section, the plain intent of the Legislature was to give to towns paying the expenses of a lunatic, committed to either state hospital, the same rights and remedies against the place of his settlement, as if the expenses had been incurred in the ordinary support of a pauper. Such has been the uniform construction of the same language in the previous statutes, of which this is a revision. *Cummington* v. *Wareham*, 9 Cush. 585. *Andover* v. *Easthampton*, 5 Gray, 390. *Amherst* v. *Shelburne*, 11 Gray, 107.

The same rules of law, therefore, apply to this case, as if it had been a suit to recover the expenses of the ordinary support of a pauper. In order to maintain the action, the plaintiff was required to prove that the person supported or relieved by the town was a pauper, and that his settlement was in the defendant town. *New Bedford* v. *Hingham*, 117 Mass. 445.

As for these reasons there must be a new trial, we have not deemed it necessary to consider the other questions raised by this bill of exceptions. *Exceptions sustained.*

B. B. Johnson, for the plaintiff, was first called upon.

M. Williams, Jr., for the defendant, was stopped by the court.

William E. Healey *vs.* Inhabitants of Newton.

Middlesex. January 18. — 21, 1876. Colt & Endicott, JJ., absent.

The posting by the selectmen of a town of a notice of their intention to lay out a town way, as required by the Gen. Sts. c. 43, § 61, is a sufficient notice under that section to the owner of the land taken, though a resident of the town, if such ownership be not known to the selectmen.

Tort for breaking and entering the plaintiff's close, removing the soil, and laying out a highway across it, by the selectmen of the defendant town. The case was submitted to the Superior Court, and to this court on appeal, on agreed facts in substance as follows:

On October 1, 1870, the selectmen of Newton issued the proper notice of their intention to lay out the way over the land in question, and a meeting was appointed to be held on the premises on

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October 17, 1870, and a notice was posted in conformity with the Gen. Sts. c. 43, § 61, more than seven days before this meeting At the time of this notice the record title of the land had, since April 6, 1869, stood in the name of Joel M. Holden, who held it for one Dennison and one William Claflin, under an agreement to transfer it to them or to others, upon their request. The land in 1870, and prior to that time, was taxed to Holden, who paid the tax bills, and was repaid by Dennison and Claflin. No personal or written notice was given to Holden of the laying out of the way, and he was not recognized as owner of the land in any way by the selectmen, or known by them as such, although he was a well known resident of the town. They gave notice to Dennison and Claflin, supposing them to be the owners of the land, more than seven days before the meeting, at which Dennison was present and advocated the laying out of the way. Holden had not authorized Dennison in any way to act for him in relation to the land. On February 11, 1871, at a meeting adjourned from October 17, 1870, the selectmen staked out the way, and on February 17 made and filed in the town clerk's office a report of their doings. On March 4, 1871, Holden, at the written request of Dennison and Claflin, conveyed the land in question to the plaintiff. On April 3, 1871, the town, at a legal meeting, accepted the selectmen's report, and subsequently the selectmen, acting as the surveyors of highways, entered upon the land and constructed the highway across it.

Putnam, J., ordered judgment for the defendant upon the foregoing facts; and the plaintiff appealed.

I. D. Van Duzee, for the plaintiff.

C. Robinson, Jr., for the defendant.

By the Court. If Dennison and Claflin were the authorized agents of Holden, notice to him might be served on them; if they were not, then, Holden not being known to the selectmen as owner of the land, the notice might be served by posting. Gen. Sts. c. 43, § 61. In either alternative, therefore, there was sufficient notice of the laying out of the way; and this fact, being conclusive in favor of the defendant, renders it unnecessary to consider the other grounds of defence.

Judgment for the defendant affirmed.

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EDWARD G. LYNES *vs.* FREDERICK A. HAYDEN, administrator

Middlesex. January 20. — 21, 1876. COLT & ENDICOTT, JJ., absent.

The jurisdiction of the Probate Court under the Gen. Sts. *c.* 117, § 5, to enforce the specific performance of a written agreement for the conveyance of real estate, is concurrent with that of this court under the Gen. Sts. c. 113, § 2, and is governed by the same rules.

A. by an instrument in writing agreed to convey to B., "from 26,000 to 28,000 feet of land, situated on Walden Street and Vassal Lane, in Cambridge, when the bounds are fixed and the street laid out." The street last referred to was not laid out or the bounds fixed during A.'s lifetime. *Held*, that the agreement was too indefinite to be enforced under the Gen. Sts. *c.* 117, § 5, after A.'s death.

APPEAL from a decree of the Probate Court, granting a petition under the Gen. Sts. *c.* 117, § 5, for the specific performance of the following agreement, signed by Washington F. Somerby, the defendant's intestate:

"Cambridge, July 20, 1871. In consideration of ten dollars to me paid by E. G. Lynes, of Cambridge, and other valuable considerations, I herein agree to deed to said Lynes from twenty-six to twenty-eight thousand feet of land situate on Walden Street and Vassal Lane in said Cambridge, when the bounds are fixed and the street laid out, the street to be forty feet wide and two hundred feet long, said deed to be subject to the conditions of a mortgage running to Fordyce M. Stimpson, and recorded with Middlesex deeds."

The decree of the Probate Court ordered the conveyance of "a certain parcel of land situated on Walden Street and Vassal Lane in Cambridge, and bounded as follows: 'Beginning at a point on Walden Street, and at the easterly side of Vassal Lane, and thence running northeasterly on Walden Street one hundred and three and 60-100 feet; thence running southeasterly by land of the heirs of said Washington F. Somerby, one hundred and seventy-two and 20-100 feet; thence running southwesterly by land of said heirs of said Somerby one hundred and eighty-eight 53-100 feet, to Vassal Lane; thence northerly on said Vassal Lane fifty-seven 90-100 feet; thence northwesterly on said Vassal Lane one hundred and forty-seven 60-100 feet to the point of beginning containing by actual survey twenty-six thousand square feet of land and no more.'"

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Hearing before *Morton*, J., who reserved the case for the consideration of the full court upon the following facts: It appeared that Somerby in his lifetime signed the above agreement; that there was an adequate consideration paid, and that the twenty-six thousand feet claimed by the petitioner was a fair and equitable portion of seventy-one thousand feet on the corner of Walden Street and Vassal Lane, owned by Somerby at the time of his death. It was admitted that Somerby died seised of the whole of the seventy-one thousand feet, and that the mortgage running to Stimpson has been removed, so that Somerby's title is free from incumbrances. There was some evidence tending to show that Somerby in his lifetime pointed out the proposed street as a proper place to locate the same, to open up the land for improvement, but no determination of the location of the proposed street was made during Somerby's life.

A. R. Brown, for the appellee.

B. F. Jacobs, for the appellant, was not called upon.

GRAY, C. J. The jurisdiction to enforce specific performance of written agreements of persons deceased, conferred upon the Probate Court by the Gen. Sts. *c.* 117, § 5, is concurrent with the jurisdiction of this court in equity under the Gen. Sts. *c.* 113, § 2, and must be governed by the same rules.

The agreement signed by the intestate describes the boundaries of the land by the adjoining streets on the northeast and northwest only, and looks to the fixing of the bounds, and the laying out of another street, before the conveyance. The report finds that the bounds were not fixed, nor the location of the proposed street determined, in his lifetime. The agreement is too indefinite to be specifically enforced. *Boston & Maine Railroad* v. *Babcock*, 3 Cush. 228. *Pray* v. *Clark*, 113 Mass. 283. *Graves* v. *Denison*, 114 Mass. 16. *Jordan* v. *Fay*, 40 Maine, 180.

Petition dismissed.

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WILLIAM E. WHITEHEAD & another *vs.* RICHARD KITSON.

Middlesex. January 17. — 22, 1876. COLT & ENDICOTT, JJ., absent.

This court has no jurisdiction in equity of a bill by the patentee of an invention for an injunction against a person falsely representing that the plaintiff's patent infringes upon a patent owned by himself, and thereby deterring others from purchasing the plaintiff's invention.

BILL IN EQUITY alleging that the plaintiffs held letters patent of the United States for a new and useful improvement in "feeding mechanisms for cotton-openers," which the plaintiff Whitehead was the inventor of and had assigned his right in to himself and the other plaintiff jointly; that the plaintiffs proceeded to manufacture this invention and to introduce it into public use, and expended much time and money in so doing; that the defendant, his attorneys, servants and agents, falsely represented to sundry persons who would be likely to buy the plaintiffs' invention, that the plaintiffs' patent interfered with a patent owned by the defendant, and that the plaintiffs could not make, vend or use their improved mechanism without infringing the defendant's patent, and that all persons who should use it would become liable to the defendant as infringers of his patent; and that by these false representations many persons were deterred from purchasing said improved mechanism. The bill prayed for discovery, injunction and further relief.

The defendant demurred for want of equity. *Wells*, J., sustained the demurrer, and the plaintiff appealed.

D. H. Rice, for the defendant.

F. T. Greenhalge, for the plaintiffs.

BY THE COURT. The case stated in the bill is not within the jurisdiction of a court of equity. *Boston Diatite Co.* v. *Florence Manufacturing Co.* 114 Mass. 69. *Prudential Assurance Co.* v *Knott*, L. R. 10 Ch. 142.

Demurrer sustained, and bill dismissed.

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CHARLES MILLER *vs.* COUNTY COMMISSIONERS OF BARNSTABLE.

Barnstable. Oct. 27, Nov. 12, 1875. — Jan. 8, 1876. MORTON & LORD, JJ., absent.

Under the St. of 1873, c. 261, providing that application for a jury may be made by petition to the Superior Court, in all cases in which it is provided by law that a sheriff's jury may be had, the tribunal to which the first application is duly made acquires exclusive jurisdiction of the subject matter.

PETITION for a writ of mandamus. The petition was filed in Barnstable County, and notice issued there returnable in Suffolk, where the case was heard by *Ames*, J., who reserved for the consideration of the full court the question whether a peremptory mandamus should issue, or the petition be dismissed, upon the following facts:

On July 1, 1874, Charles Miller applied to the county commissioners to estimate his damages by the location and construction, over his lands in Falmouth, of the railroad of the Cape Cod Railroad Company, of which corporation the Old Colony Railroad Company was the successor, and had the duties and obligations. On December 31, 1874, after notice to this corporation and a hearing, the county commissioners estimated his damages at $875.

On January 1, 1875, the corporation filed a petition in the clerk's office of the Superior Court for the county of Barnstable, representing that it was aggrieved by the estimate of the county commissioners, and praying for a jury to assess the damages at the bar of that court; and on the same day filed with the clerk of the county commissioners a statement that it had filed such a petition in the Superior Court. On January 12, the clerk of the Superior Court issued an order of notice thereon, returnable at April term 1875, which was served on January 20, by delivering an attested copy to the attorney of record of Miller, who resided out of the Commonwealth. On May 14, 1875, a further order of notice, returnable at October term 1875, was issued in like manner, and on May 21, served by leaving an attested copy at Miller's dwelling house in the city of New York.

On April 13, 1875, Miller filed a petition with the county commissioners, alleging that he was aggrieved by their estimate of

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his damages, and praying for a warrant for a sheriff's jury to assess the same; and upon this petition notice was issued by the county commissioners to the railroad corporation, returnable on May 4, and on that day the corporation filed an answer, setting up the filing of its petition in the Superior Court, and the parties appeared and were heard before the commissioners, who dismissed Miller's petition.

T. M. Stetson, for the petitioner.

G. Marston & J. H. Benton, Jr., for the respondents.

GRAY, C. J. The damages, occasioned to the lands of any person by the laying out, making and maintaining of a railroad, are to be estimated in the first instance by the county commissioners, and either party, if dissatisfied with their estimate, may, within one year after it is returned, apply for a jury to assess the damages. Gen. Sts. *c.* 63, §§ 21, 22. Under the General Statutes, such application could only be made to the county commissioners, and the trial had before a sheriff's jury. Gen. Sts. *c.* 43, §§ 22 *& seq.* But by the St. of 1873, *c.* 261, "in all cases in which it is provided by law that a sheriff's jury may be had for any purpose, application for a jury may be made by petition to the Superior Court; and thereupon, after such notice as said court shall order to the adverse party or parties, a trial may be had at the bar of said court, in the same manner [as] other civil cases are there tried by jury."

By whichever party the application for a jury is made, the matter to be tried is the same, being the amount of the damages to be paid by the corporation to the landowner. *Connecticut River Railroad* v. *Clapp*, 1 Cush. 559. *New Haven & Northampton Co.* v. *Northampton*, 102 Mass. 116, 123. If both parties applied to the same tribunal, a warrant for a jury might perhaps be properly ordered upon each application, in order that if one party should fail to take out his warrant and proceed upon it, the other party might nevertheless proceed upon his; but if both parties proceeded, only one trial would be had, and one verdict returned upon both warrants. *Parker* v. *Boston & Maine Railroad*, 3 Cush. 107, 111. But in cases like this, (in which no attachment or custody of property is necessary,) if the parties apply to distinct tribunals of concurrent jurisdiction in the same state, that tribunal to which the first application is duly made

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acquires exclusive jurisdiction of the subject, and so long as proceedings thereon are pending before it, no action can be had by the other. *Stearns* v. *Stearns*, 16 Mass. 167. *Powers* v. *City Council of Springfield*, 116 Mass. 84.

By the St. of 1874, *c.* 283, petitions for the assessment of damages, required by previous laws to be filed in the Superior Court or with the county commissioners, may be filed with the clerk of either tribunal when it is not in session, and such filing is to be deemed a commencement of proceedings. It follows that by the petition filed by the railroad corporation in the clerk's office of the Superior Court that court acquired exclusive jurisdiction of the case, and that the county commissioners rightly refused, upon the subsequent application of the landowner, to issue a warrant for a sheriff's jury.

It is possible that the landowner, in order to secure his right of trial by jury, notwithstanding the limitation of one year, in case the railroad corporation should abandon the petition in the Superior Court, was entitled to file with the commissioners his application for a jury, and that the commissioners erred in dismissing that application. But the remedy for that error, if there was one, is by certiorari and not by mandamus.

Writ of mandamus refused.

BARNSTABLE SAVINGS BANK *vs.* RUSSELL A. BALLOU & others.

Barnstable. January 25. — 26, 1876. ENDICOTT & DEVENS, JJ., absent.

In an action by a savings bank upon a promissory note, against one signing as surety thereon, parol evidence that the defendant signed the note solely at the request of the treasurer of the bank, because of a rule thereof as to the number of the names required upon a loan, and upon the assurance that the bank would not look to him for payment, is inadmissible as contradicting the written contract.

CONTRACT against Russell A. Ballou, S. J. Ballou, and Benjamin B. Newhall, on two promissory notes, signed by the first named defendant as principal, and by the other defendants as sureties. The first note was as follows:

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"$5000. Boston, August 31st, 1872. For value received, we, R. A. Ballou, as principal, and S. J. Ballou and Benj. B. Newhall, as sureties, promise to pay the Barnstable Savings Bank, or order, five thousand dollars in one year from date, with interest to be paid semi-annually at the rate of eight per cent. per annum, and at the same rate until full payment of said sum."

The second note was similar in form, dated September 23, 1872, for the sum of $10,000, and signed by the same parties. The defendants, R. A. Ballou and S. J. Ballou, were defaulted. The answer of the defendant Newhall alleged that there was no consideration for his signature to the notes; that he was induced to become surety thereon, at the sole request of, and wholly on account of, the following inducements and representations of Daniel Scudder, then the treasurer and authorized agent of the plaintiff in lending the money and taking the notes: that Scudder told him at the time he signed, and before signing the notes, that they were entirely good, and amply secured by collateral; that he only wanted Newhall as surety because the rule of the plaintiff's bank required three names to procure a loan; that he Newhall would take no risk by so signing, and gave him to understand that the bank would not look to him to pay any part of the notes, and that he had no interest in said notes, and was in no way benefited by signing them.

At the trial in the Superior Court, before *Pitman*, J., the defendant offered to prove the allegations in his answer; but the judge ruled that such proof would constitute no defence, the defendant disclaiming fraud, and ordered a verdict for the plaintiff; and the defendant alleged exceptions.

H. P. Harriman, for the defendant Newhall.

J. M. Day, for the plaintiff, was not called upon.

By the Court. The parol evidence offered by the surety tended to contradict the written contract which he had signed, and was rightly rejected. *Exceptions overruled.*

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KERON CURLEY *vs.* JOHN CHADBURNE & another.

Norfolk. January 25. — 31, 1876. COLT & ENDICOTT, JJ., absent.

An award under the Gen. Sts. c. 147, was properly inclosed and sealed up by the arbitrator and transmitted to the court by the hands of the counsel of the party in whose favor it was made, who deposited it unopened with the papers in an action of contract brought upon it. It appeared that the award was not opened by the clerk of the court, nor by either counsel, and it did not appear by whom it was opened. There was subsequently found among the papers in the suit one purporting to be an award by the same arbitrator between the same parties, opened, without envelope or wrapper, or aught to show when or by whom it had been opened or filed. The Superior Court held that the award had not been so returned, filed and opened, as to warrant its acceptance or recommitment; and that there was not any award before the court. *Held*, on a bill of exceptions setting forth the above facts, that there was nothing to show that the judge erred in holding that the Gen. Sts. c. 147, § 8, had not been complied with.

MOTION in the Superior Court to accept the award of an arbitrator under the Gen. Sts. c. 147. The objection made to its acceptance was that it was not returned, filed and opened in compliance with § 8 of that chapter.

The paper offered for acceptance was an instrument dated December 26, 1873, purporting to be an award in favor of the plaintiff, under a submission before a justice of the peace, which was attached to it. There was nothing about it to show how, when or where it was returned, excepting the words "Filed October 8, 1874," written on its back.

It was proved by oral testimony that the arbitrator inclosed his award in an envelope properly indorsed and directed to the clerk of the Superior Court, and intrusted it to the plaintiff's counsel, who deposited it, unopened, at April term 1874, with the papers in an action of contract brought by the plaintiff against the defendants upon the award, the essential parts of which had been communicated by the arbitrator to the parties; that the award was not opened by the clerk of the court, or by the counsel, or any other person within the clerk's knowledge, that within ten days after the entry of the above named action the defendant's counsel found among the papers belonging to it the one submitted for acceptance, opened, and with no traces of any envelope or wrapper; that when the above named action came on for hearing, the paper was then found among those of the

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suit, opened, and without envelope or wrapper; that after the determination of the suit by judgment for the defendants, it was on the same day entered, or reëntered, with a petition for its acceptance, and that then the clerk wrote on its back "Filed October 8, 1874."

On the above facts, *Allen*, J., ruled that the award had not been so returned, filed and opened, as to warrant either its acceptance or recommitment; and that there was not in fact any award before the court. The plaintiff alleged exceptions to this ruling.

E. Davis, for the plaintiff.

W. F. Estey, for the defendants.

By the Court. There is nothing in the bill of exceptions to show that the judge erred in holding that the provisions of the Gen. Sts. *c.* 147, § 8, had not been complied with.

Exceptions overruled.

Frances Torrey *vs.* Israel W. Munroe.

Norfolk. January 27. — 31, 1876. Endicott & Devens, JJ., absent.

The question of the position of the boundary line of adjacent parcels of land cannot be submitted to arbitration under the Gen. Sts. *c.* 147, § 1.

An award by arbitrators under the Gen. Sts. *c.* 147, determining a boundary line, cannot be enforced by judgment of the Superior Court under § 10 of that chapter.

Appeal under the Gen. Sts. *c.* 147, § 12, from an order of the Superior Court accepting an award made and returned into court in pursuance of a submission under that chapter.

The demand submitted was "the determination and establishment of the true and original division line between the estates of said Torrey and Munroe, situated on Washington Street, in said Quincy, said line having been long in dispute."

The award determined and established the line, describing it, and referring to a plan annexed and made part thereof.

The defendant moved to set aside the award for the following reasons: "1. That the said arbitrators have no jurisdiction of the subject matter submitted to them, the same involving the

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title to real estate, and being neither the subject of a personal action at law or suit in equity.

"2. That the award was such that no judgment can be rendered upon it which can be enforced in this court."

J. Hewins, for the plaintiff.

J. E. Tirrell, for the defendant.

GRAY, C. J. The judgment of the Superior Court, accepting the award, was erroneous: 1st. Because the matter in controversy could not be the subject of a personal action at law, or of a suit in equity, and therefore could not be submitted to arbitration by agreement before a justice of the peace under the statute. Gen. Sts. *c.* 147, § 1. *Hubbell* v. *Bissell*, 13 Gray, 298. 2d. Because the award could not be enforced by any judgment that the Superior Court could render. Gen. Sts. *c.* 147, § 10. *Brown* v. *Evans*, 6 Allen, 333. *Award set aside.*

SARAH LYONS *vs.* INHABITANTS OF BROOKLINE.

Norfolk. January 28. — 31, 1876. COLT & ENDICOTT, JJ., absent.

A child injured, while sitting upon the sidewalk of a public highway, by the falling upon her of a stone left there to be used as a curb-stone, is not a traveller upon the highway.

A town which places stones insecurely in a highway is not liable to a person injured by one of the stones falling upon him, the fall being caused by the act of a third person.

TORT for personal injuries sustained through an alleged defect in a highway in the defendant town.

At the trial in the Superior Court, before *Dewey*, J., there was evidence tending to show that the plaintiff, a child between three and four years old, was permitted by her parents to go out into a public highway in the defendant town, for the purpose of walking thereon; that she sat down on the sidewalk with her feet in the gutter, near some stones that had been placed there by the defendant to be used as curb-stones; that there were other young children playing about these stones, and that in consequence of the acts of these other children one of the stones, which had been insecurely placed, fell over and broke one of the plaintiff's legs and injured the other.

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The judge instructed the jury to return a verdict for the defendant if they should find the facts to be as above stated. The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

A. B. Berry, for the plaintiff.

M. Williams, Jr., for the defendant, was not called upon.

BY THE COURT. The jury, under the instructions given them, having found that the plaintiff was not travelling in the highway, and that the injury to her was caused by the act of third persons, the town is not liable. *Tighe* v. *Lowell*, *ante*, 472. *Kidder* v. *Dunstable*, 7 Gray, 104. *Exceptions overruled.*

GEORGE W. RIDER *vs.* T. D. PEASE & others.

Hampden. Sept. 29, 1875.— Feb. 29, 1876. AMES, DEVENS & LORD, JJ., absent.

A. and B., members of a firm, assigned a patent right to C. and D., and by a contract, made the same day with C. alone, agreed that, if C. should become dissatisfied with the purchase within a certain time, they would repurchase of him the patent right and repay him the amount paid therefor, provided he should give them notice thereof within a certain time. In an action on this contract by C. against the firm, it appeared that C. became dissatisfied and gave the defendants notice thereof, requiring them to repurchase. The plaintiff testified that, within the time agreed, he asked A. what he would do about the contract, who said he would try to get another member of the firm to help the plaintiff out of it, and that, after the action was brought, the one, with whom the conversation was had, refused to repurchase. The plaintiff also testified that, after the expiration of the time stated in the contract, but before the action was begun, he had a conversation with B., who said he could do nothing about the repurchase, as he was too poor to raise money. The judge ruled that there was not sufficient evidence of a refusal to repurchase on the part of A. to warrant the jury in finding a waiver of a tender of a deed, and that the refusal of B., on the ground of his poverty, did not bind A., directed a verdict for A. and reported the case to this court, a new trial to be ordered if the ruling was incorrect. *Held*, that there was evidence sufficient to warrant the jury in finding that the defendants had refused to perform the contract; that the ruling was incorrect, and that a new trial must be granted.

CONTRACT against T. D. Pease, William Thayer and Thomas Campbell, copartners doing business under the firm name of the New England Washer Company, upon an agreement signed by

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said company, and dated October 11, 1872, which, after reciting the sale by the defendant to the plaintiff of "the right to make, use and vend a certain patent right for improvement in wash boilers granted to J. C. Tilton by letters patent of the United States," proceeded as follows:

"Now, therefore, the said New England Steam Washer Company, in consideration of the premises aforesaid, hereby promises, covenants and agrees to and with the said George W. Rider, that if he, the said Rider, shall, at the end and expiration of one year from and after the date of these presents, become and be dissatisfied with his said purchase above mentioned, then said New England Steam Washer Company will purchase of said Rider said patent right, and repay to him the amount by him paid to said company for said patent right, less and deducting from said amount so paid by said Rider the amount of all such sales as said Rider may have made of said patent right for said territory above mentioned, or any part thereof, at a rate not less than ten dollars for every one thousand population living upon the territory which may be by him sold, and in case said Rider shall sell said patent right for said territory, or any part thereof, for any sum or sums at a less rate than ten dollars for every one thousand of population living upon said territory sold, then said Rider shall allow to said company and deduct from the amount to be paid him by said company, a sum of money equal to ten dollars for every thousand people living on said territory, which may by him be sold as aforesaid; always provided, that, if said Rider shall require the said company to repurchase of him the right by said company sold to him, as above mentioned, he shall do so within fifteen days from the expiration of one year from the date of these presents: and if he shall fail to do so within the time above mentioned, then said company shall be released and discharged from all liability, duty and obligation under and by virtue of this agreement." Writ dated March 24, 1874.

The declaration set forth the contract, and alleged that at the expiration of one year from the date of said contract the plaintiff "became, and was dissatisfied with his said purchase, and within fifteen days from the expiration of one year from the date of said contract, he gave the defendants due notice of his dissatisfaction,

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and that he required them to repurchase said patent right, which they refused to do." Service of the writ was not made on Campbell. The answer of the other defendants was a general denial.

Trial in the Superior Court, before *Colburn*, J., who, after verdict, reported the case to this court in substance as follows:

It appeared in evidence that on October 11, 1872, the defendants, each signing his own name, assigned the patent right to the plaintiff and Edward E. Rider, who were father and son; that the father paid the entire consideration for the purchase of the territory; that the plaintiff became dissatisfied with his purchase within the year, and on October 20, 1873, caused to be served on each of the defendants notices signed by him, of which the following is a copy:

"To the New England Steam Washer Company: Please take notice, that having become dissatisfied with my purchase of the right to make, use and vend a certain patent right for improvement in wash boilers, granted to J. C. Tilton by letters patent of the United States, numbered 119,063, in, for and over the territory of the county of Providence in the State of Rhode Island, excepting the town of Foster in said county, I require you to repurchase from me said right, in accordance with the stipulations in your agreement with me, bearing date the 11th day of October, A. D. 1872."

The plaintiff testified that he called on the defendant Pease, after service of said notice, on October 20, 1873, or the day following, and that Pease told him that he and Thayer were the moneyed men of the partnership, and that Campbell did the business for the firm. "I asked Pease if he had not received his part or portion of the consideration for the purchase of the patent and he replied that he had, after deducting the expenses. I asked him what he would do about the contract. Pease replied that he knew nothing of the contract until informed of it by one Phillips. He said he would try to get Campbell to help me out of it." The plaintiff testified further that he had a conversation with Campbell and Pease after this action was brought, in the autumn of 1874, and that both refused then to repurchase the patent.

It was in evidence, also, that after the expiration of the year and fifteen days from the date of the contract, and some time be-

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fore the bringing of this suit, the defendant Thayer called at the office of the plaintiff's attorneys, in answer to a letter from them, and there stated that he was a member of the Steam Washer Company; that he had paid in $1000; that Pease and Campbell were with him; that he was to share in the profits of the business, but was not to be called on for any more money; that he received no money from this sale, and could do nothing about the repurchase of the territory under the agreement, as he was too poor to raise money. This was all the evidence of the plaintiff upon the question of tender and refusal to repurchase, and the defendants rested their defence upon the plaintiff's evidence.

Upon this evidence the defendant Pease asked the court to rule that the plaintiff could not recover, because there was no evidence that the plaintiff had offered to reconvey the patent right conveyed to him and Edward E. Rider, as aforesaid, nor of his readiness so to do, as the record title stood in the name of the plaintiff and his son, as appeared by the deed.

The plaintiff contended that there was sufficient evidence to go to the jury upon the question, whether there had been such a refusal on the part of Pease as to amount to a waiver of tender of a deed of reassignment, and that the refusal of Thayer amounted to a waiver of a tender, and was binding upon his other copartners. It was further contended by the plaintiff that if the jury found that he made a demand on the defendants for the performance of their contract, an offer to perform on his part might be implied and understood; and that the neglect of the defendants to comply with the plaintiff's demand, without offering any reason for non-compliance, the jury might regard as dispensing with any necessity of tender.

The judge ruled that there was not sufficient evidence of a refusal to repurchase on the part of Pease to warrant the jury in finding a waiver of a tender of a deed, and that the refusal of Thayer on the ground of his poverty was not binding on the other members of the firm, for whom he did not profess to speak.

The plaintiff did not wish for a verdict against Thayer alone, and the court directed a verdict to be rendered by the jury for the defendants, which was done. The question was reported, by the consent of the parties, to this court for a decision of the law involved. If the ruling was correct, the verdict to stand; otherwise, a new trial to be ordered.

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N. A. Leonard & W. S. Greene, for the plaintiff, cited *Rawson* v. *Johnson*, 1 East, 203; *Howland* v. *Leach*, 11 Pick. 151, 155; *Tinney* v. *Ashley*, 15 Pick. 546, 552; *Adams* v. *Clark*, 9 Cush. 215; *Cook* v. *Doggett*, 2 Allen, 439; *Smith* v. *Boston & Maine Railroad*, 6 Allen, 262, 273; *Hapgood* v. *Shaw*, 105 Mass. 276; *Carpenter* v. *Holcomb*, 105 Mass. 280, 284; *Scanlan* v. *Geddes*, 112 Mass. 15.

G. M. Stearns, for the defendants. 1. The plaintiff was bound to reconvey to the defendants if he required them to repurchase. He could not recover the contract price without showing readiness and an offer on his part to perform his part of the contract. *Smith* v. *Boston & Maine Railroad*, 6 Allen, 262. *Collins* v. *Delaporte*, 115 Mass. 159. *Hunt* v. *Livermore*, 5 Pick. 395. *Dana* v. *King*, 2 Pick. 155.

2. The facts disclosed do not show that the plaintiff ever offered to convey to the defendants the patent rights, or that he ever realized that it was incumbent upon him to do so. Nor do they show that he was ready to perform. On the contrary it appears that he was only owner of one half the rights to be conveyed. There was no evidence that the plaintiff could get the other half to convey. In *Carpenter* v. *Holcomb*, 105 Mass. 280, 285, it appeared that the incumbrance was such that the plaintiff had the right to discharge it, and that it was understood by both parties he offered to do so. In this case the plaintiff had no power over the other half. For all that appeared Edward E. Rider would not sell his half.

3. There was no evidence of such a refusal to accept performance, if offered by the plaintiff, as would warrant the jury in finding a waiver of the right to require performance or an offer of performance. To warrant such a finding, there must be evidence of an "unqualified refusal," the plaintiff having the ability to perform and the defendant knowing he can perform. *Carpenter* v. *Holcomb*, *ubi supra*. *Pomroy* v. *Gold*, 2 Met. 500. *Cook* v. *Doggett*, 2 Allen, 439. In *Carpenter* v. *Holcomb*, the court find evidence that the refusal was unqualified on the part of the defendant, he knowing of the mortgage and not doubting the plaintiff's ability to remove it. In the case at bar the defendant Pease did not refuse absolutely, he only delayed. Neither of the defendants can be said to have waived the plaintiff's want of readi-

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ness and ability to perform, for there was no allusion to the condition of the title and no positive knowledge on their part as to the position of the title. The language of refusal was much stronger in *Pomroy* v. *Gold*, cited above, than in this case. It was held no waiver. The statement of Thayer was not a positive refusal to perform. He only declared, by reason of poverty, his present inability to raise the money. But, if there was a refusal on the part of Thayer, the ruling of the court was correct. The plaintiff, by the contract, was to notify the defendants, if he required the repurchase, within a year and fifteen days. The defendants had the right to repurchase at once upon notice. The plaintiff must, therefore, be ready to convey when he gives notice that he requires the repurchase and repayment. If there was no offer to reconvey, or waiver on the part of the defendant, within that time, the plaintiff cannot recover. Furthermore, the plaintiff did not wish a verdict against Thayer alone. He therefore could have no verdict, unless what occurred between Thayer and the plaintiff's attorney affected the other members of the firm. Neither party treated the interview as anything more than one relating to his private affairs. The deed of the patent was signed by each member separately. The plaintiff had given each a notice long before. Thayer was at the office of the attorney in answer to a letter to him individually. It does not appear the letter was about this business. He was not asked to repurchase. The plaintiff's attorney did not in fact speak to him about the matter. He volunteered some information about the condition of his private finances and what he could not do. He did not say that the firm would not or could not repurchase. At least it appears that he was not asked in behalf of the firm to repurchase. It was necessary the plaintiff should have requested performance and offered to perform on his part. *Tasker* v. *Bartlett*, 5 Cush. 359.

BY THE COURT. We are of opinion that the evidence of the plaintiff's conversations with Pease and with Thayer was sufficient to warrant a jury in finding that the defendants had refused to perform the contract. It follows that the ruling of the learned judge in favor of the defendants was incorrect, and, by the terms of the report, there must be a *New trial.*

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BOSTON AND MAINE RAILROAD *vs.* PORTLAND, SACO AND PORTSMOUTH RAILROAD COMPANY.

Suffolk. Nov. 15, 1875. — Feb. 28, 1876. ENDICOTT, DEVENS, & LORD, JJ., absent.

Where a person, answerable in contract to two jointly, settles with one of them so that that one has no longer any real interest in the matter in dispute, it is a severance of the cause of action, and the debtor is liable in an action at law to the other alone.

Where A., answerable in contract to B. and C. jointly, makes an agreement with B., by which B. agrees to pay, release and discharge all A.'s debts, and to indemnify him against all demands, such agreement puts an end to all real interest of B. in the claim of B. and C., and C. may maintain an action at law alone against A.

CONTRACT. The material facts, as they appeared from the pleadings and a report of the case by *Devens*, J., were as follows:

The plaintiff and the Eastern Railroad Company made a joint contract with the defendant, in 1847, by which they had possession of the defendant's railroad and other property, under an agreement to run and operate the same, paying the defendant a fixed dividend on its capital stock therefor, and taking to their own use all the income and profits of working the road. They further agreed to make all betterments, improvements, and additions to the equipment which they should find necessary or expedient, and the defendant promised to pay them for such betterments, improvements and additions, at the termination of the contract. The contract was terminated, according to its provisions, in January, 1871; and the plaintiff contended that there was due to the plaintiff and the Eastern Railroad Company at that time, from the defendant, about one million of dollars for such betterments and additions; and in this action sought to recover one half thereof.

In May, 1871, the Eastern Railroad Company made a new agreement with the defendant for the exclusive possession and running of the defendant's road, which agreement contained the following clause:

"In furtherance of the objects and purposes of the parties hereto, the said Eastern Railroad Company agrees with the said Portland, Saco and Portsmouth Railroad Company that the said

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Eastern Railroad Company will forthwith assume and will pay, release or discharge all the debts, liabilities and obligations of every description of the said Portland, Saco and Portsmouth Railroad Company, by reason of any matter or thing heretofore done, suffered or transacted by said Portland, Saco and Portsmouth Railroad Company, or which it may hereafter become liable and bound to pay or do, by reason of any acts or omissions of the said Eastern Railroad Company as the agent of the said Portland, Saco and Portsmouth Railroad Company, under this contract, and will at all times save and keep the said Portland, Saco and Portsmouth Railroad Company harmless and indemnified from and against all claims, penalties and forfeitures, suits and demands, for or by reason of any of the said debts, obligations or liabilities, and all debts, obligations, liabilities, penalties and forfeitures arising from any of the acts or omissions of the said Eastern Railroad Company, as agents as aforesaid or otherwise, so that the said Portland, Saco and Portsmouth Railroad Company shall not suffer any loss or injury thereby, and will obey all orders, judgments and decrees of any and all courts having jurisdiction in the premises, and save and keep the said Portland, Saco and Portsmouth Railroad Company, its property and franchise, from loss or injury thereby and protected fully therefrom."

Before bringing the action, the plaintiff requested the Eastern Railroad Company to join therein as a party plaintiff, and it refused to do so.

The judge reserved the question, for the consideration of the full court, whether the plaintiff could alone maintain the action for its share of the amount due under the contract. If the action could be maintained, it was to stand for trial, after having been sent to an auditor; otherwise, judgment for the defendant, unless the court should be of opinion that by any amendment in the form of proceedings the plaintiff might maintain the action.

H. W. Paine & E. R. Hoar, (*C. F. Choate* with them,) for the plaintiff.

S. Lincoln, Jr., for the defendant.

GRAY, C. J. It has long been a settled rule in this Commonwealth, in accordance with the law as understood in England at the time of our Revolution, that when a person, answerable in contract to two jointly, settles with one of them, so that that

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one has no longer any real interest in the matter in dispute, it is a severance of the cause of action, and the debtor is liable in an action at law to the other alone. Lord Mansfield, in *Garret* v. *Taylor* (1764), and *Kirkman* v. *Newstead* (1776), 1 Esp. Dig. 117. 1 Chit. Pl. (2d Am. ed.) 7. *Austin* v. *Walsh*, 2 Mass. 401, 405. *Baker* v. *Jewell*, 6 Mass. 460, 461. *Holland* v. *Weld*, 4 Greenl. 255. *New Braintree* v. *Southworth*, 4 Gray, 304, 306. *Sawyer* v. *Steele*, 4 Wash. C. C. 227, 228.

A rule of practice, long recognized and acted on, and so simple and convenient, enabling a court of law to do justice between the parties, without joining as a formal plaintiff one who has no real interest in the controversy, or compelling a resort to equity, should not be reversed upon technical grounds, or because the modern rule in England is different. See *Hatsall* v. *Griffith*, 4 Tyrwh. 487; *S. C.* 2 Cr. & M. 679.

The original agreement of this defendant was with the plaintiff and the Eastern Railroad Company jointly. But the subsequent contract of that corporation with the defendant to pay, release and discharge all its debts, and to indemnify it against all demands, while it did not amount to a formal release, did put an end to all real interest of the Eastern Railroad Company in the liability sought to be enforced in this action.

There being nothing in the report to show that the application of the Massachusetts rule will produce any inconvenience or danger of injustice, the case, according to the terms of the reservation, is *Referred to an auditor.*

HENRY FURNAS *vs.* EDMUND DURGIN.

Suffolk. Nov. 11, 1875. — Feb. 29, 1876. ENDICOTT & LORD, JJ., absent.

An entry upon a mortgaged estate, upon breach of condition, for foreclosure, is, without actual ouster, an eviction for which a warrantee can recover upon his covenant.

The certificate of an entry upon a mortgaged estate to foreclose the mortgage under the Gen. Sts. c. 140, § 2, duly recorded, is sufficient evidence of eviction to sustain an action for a breach of a covenant of warranty.

Upon an action for breach of covenant of warranty upon the eviction of the warrantee by an entry of the mortgagee for foreclosure, the measure of damages is the amount of the mortgage debt and interest, if that is less than the full value of the estate.

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The acceptance by a grantee of a deed of land containing a clause stating that it is subject to a mortgage "which the grantee hereby assumes and agrees to pay with the interest now due thereon," constitutes a contract by the grantee not merely to indemnify the grantor, but to pay the debt, if it be the debt of the grantor.

A promise to pay the debt of the promisee, no time being specified, is a promise to pay it when due, or forthwith if it is already due.

Upon an action upon a promise to pay a debt of the promisee brought after it is due, but before any payment by the promisee, the measure of the damages is the amount of the debt and interest.

Upon an action of contract against a grantor for a breach of the covenant of warranty in a deed which contained a release by his wife of her right of dower and homestead, there was evidence that the deed was signed by the wife before the description of the land or any other writing had been made in the deed, and that she never saw it afterward, and did not redeliver it after the description and the other parts had been written in. *Held*, that this did not invalidate the deed as against the grantor.

Upon an action of contract for a breach of warranty in a deed by the defendant to the plaintiff of land in W. R., and the non-payment of a mortgage debt of the plaintiff as stipulated in a deed of the plaintiff to the defendant, of land in H. P., it appeared that the parties had bargained to exchange the land in H. P., and land in B. belonging to the plaintiff, for the land in W. R. belonging to the defendant. The execution of this exchange was disputed by the defendant. The plaintiff introduced his deed to the defendant of the land in B., and was permitted, against the defendant's objection, to put in an agreement signed by the defendant, and dated two days after the latter deed, whereby the defendant agreed to convey to the plaintiff the same land in B. *Held*, that the paper, as evidence that the defendant, after the date when the plaintiff contended that the deeds were delivered, had treated the land in B. as his own, tended to show that the bargain had been carried out.

CONTRACT in several counts, some for breach of a covenant of warranty in a deed from the defendant to the plaintiff, and others for breach of an agreement to pay mortgages subsisting upon an estate conveyed by the plaintiff to the defendant. Trial in the Superior Court, before *Pitman*, J., who allowed a bill of exceptions in substance as follows:

The defendant by his deed dated August 19, 1872, conveyed to the plaintiff in fee simple a parcel of land in West Roxbury, with the following covenants: "And I do hereby, for myself and my heirs, executors and administrators, covenant with the said grantee and his heirs and assigns, that I am lawfully seised in fee simple of the granted premises; that they are free from all incumbrances except a mortgage from M. E. Bowe to F. D. Osgood, for three hundred and fifty dollars and interest; that I have good right to sell and convey the same as aforesaid; and that I will, and my heirs, executors and administrators shall, warrant and

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defend the same to the said grantee and his heirs and assigns forever, against the lawful claims and demands of all persons."

This deed also contained a release by the defendant's wife of her right of dower and homestead in the usual form.

The breaches of covenants alleged in the declaration were that besides the mortgage mentioned in the deed the land was subject to a mortgage made by Michael E. Bowe, a former owner, to Freeman D. Osgood, for $3000, with interest at 8 per cent., payable in one year, dated June 1, 1871, and duly recorded; that this mortgage had been duly assigned to Betsy J. Pope, who had entered upon the land for possession for breach of the condition of the mortgage and to foreclose; and that the plaintiff had thereby lost possession. The plaintiff introduced in evidence the above mentioned deed and mortgage, the assignment of the mortgage by Osgood to Pope, dated July 6, 1871, duly recorded, and a certificate of entry under the statute to foreclose the same, dated December 9, 1872, and duly recorded. It appeared that no payment had been made upon the mortgage from the date thereof to its assignment; also that in March, 1873, the defendant made an offer to the attorney of Pope to redeem the mortgage; but nothing further was shown as to payment or amount due except to reduce the consideration of the assignment, and to reduce the claim made by the plaintiff.

The plaintiff by his deed dated August 19, 1872, duly acknowledged and recorded, conveyed to the defendant a parcel of land in Hyde Park, "subject to mortgages amounting to $6500, which the grantee hereby assumes and agrees to pay, and all interest now due on existing mortgages on said property, together with the taxes due on the same." Among these mortgages was one for $1500, payable in one year, dated September 1, 1871, duly recorded, made by the plaintiff to George D. Cox, to secure the payment of the plaintiff's promissory note payable to the order of Cox, for the same amount and time, and of the same date. The note and mortgage were assigned by Cox to Joseph P. Paine, by deed of the same date, duly recorded.

The breach of contract alleged in the declaration was the nonpayment of this note and mortgage. They were, with the assignment, put in evidence by the plaintiff.

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The only evidence offered as to the payment or non-payment of said note and mortgage was the testimony of Mr. Kittredge, who testified that as attorney at law he called on the defendant in reference to this mortgage within three days after maturity of the note, and that the defendant said he would pay it in a few days, and that he went two or three times after and received the same answer.

The defendant introduced evidence tending to prove that he never gave or delivered the deed of the West Roxbury estate, and that it was obtained from his office by fraud and in his absence, and without his knowledge or consent; also evidence tending to prove that the plaintiff never delivered the deed of the Hyde Park estate to the defendant, and that said deed never was accepted by the defendant, and that the defendant refused to accept the deed with any clause in it whereby the defendant was to assume and pay any mortgages, and that the plaintiff caused said deed to be recorded without the knowledge or consent of the defendant. The plaintiff's testimony was to the contrary on all these points.

The defendant testified that the deed of the West Roxbury estate was signed by Lucretia D. Durgin, his wife, by his own procurement, before the description of the land or any other writing had been made in the deed, and that said Lucretia D. never saw it afterwards, and did not deliver it or redeliver it after said description and other writing had been written in said deed.

It appeared in evidence that the parties had bargained together to exchange the real estate aforesaid in Hyde Park, and an estate in Shawmut Avenue, Boston, both belonging to the plaintiff, for the real estate in West Roxbury, the property of defendant, and the plaintiff introduced the deed of said Shawmut Avenue estate from himself to defendant, dated August 19, 1872, and duly recorded. The plaintiff was allowed, against the objection of the defendant, although it was not alluded to in the declaration, to put in an agreement signed by the defendant, dated August 21, 1872, whereby he agreed to convey to the plaintiff the Shawmut Avenue estate, subject to the mortgages thereon, for $1500.

The defendant requested the judge to instruct the jury as follows:

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"1. If the jury believe upon all the evidence that Lucretia D. Durgin signed the deed of the estate in West Roxbury before the description of the property and the other written parts thereof were written in, and that there was no redelivery thereof by said Lucretia D., then the conveyance would be void.

"2. If the jury are satisfied upon all the evidence that there was a good and legal delivery of the deed of the West Roxbury estate, and that there has been a breach of the covenants by defendant, then the measure of damages which the plaintiff would be entitled to recover would be the amount he had fairly paid to remove the incumbrance, and if he has paid nothing towards relieving the incumbrances he can recover only nominal damages.

"3. If the jury are satisfied upon all the evidence that there was a good and legal delivery of the deed of the Hyde Park estate to the defendant and accepted by him after knowing its contents, and that the plaintiff is entitled to recover, the measure of damages would be the amount which plaintiff has paid to remove the incumbrance, and if he has paid nothing on said $1500, he would be entitled to recover only nominal damages."

The judge refused to give these instructions; but, after appropriate instructions as to what the plaintiff must prove, ruled that the measure of damages for breach of the agreement to assume and pay the mortgage on the Hyde Park estate would be the amount of the note and interest; and that the measure of damages for breach of warranty in reference to the West Roxbury estate would be the amount necessary to redeem the same, namely, the mortgage debt outstanding, including interest.

The jury returned a verdict for the plaintiff, and assessed damages in the sum of $2740.80; and the defendant alleged exceptions.

F. A. Perry, for the defendant.

H. N. Shepard, for the plaintiff.

DEVENS, J. The plaintiff relies, to maintain his action, upon a breach by the defendant of the covenant of general warranty in the deed of the West Roxbury estate of the date of August 19, 1872, — this estate being at the time of its execution subject to a mortgage originally made to Michael E. Bowe, for the sum of $3000, and by intermediate assignments transferred to Betsy J. Pope, — and further upon an eviction by Mrs. Pope, who on De-

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cember 29, 1872, made an entry upon the premises in order to foreclose the said mortgage.

The certificate of entry produced at the trial is made by the statute evidence of the fact of such entry. Gen. Sts. *c.* 140, § 2. *Oakham* v. *Rutland*, 4 Cush. 172. *Thompson* v. *Kenyon*, 100 Mass. 108. There was no other evidence of eviction or of any actual ouster of the plaintiff from the occupancy of the premises, and the defendant contends that this entry was not an eviction which will enable the plaintiff to recover upon his covenant of warranty. But that it is so is settled by the law of this Commonwealth. *Tufts* v. *Adams*, 8 Pick. 547.

In *White* v. *Whitney*, 8 Met. 81, 89, the facts, as stated in the opinion of the chief justice, are not distinguishable from those in the present case. The entry to foreclose was made under the provisions of the Rev. Sts. *c.* 107, §§ 1, 2, which do not vary from those of Gen. Sts. *c.* 140, and it was held that the "taking actual possession of the premises, by means of which the plaintiff was ousted," was a breach of the warranty. That case did not show, any more than the one before us, any actual ouster from occupancy of the holder of the equity of redemption, but from the time of such entry the legal possession was that of the mortgagee, whoever the occupant might be. Permitting the mortgagor to remain in occupancy during the three years, does not render the entry any less effectual for the purpose of foreclosure. *Ellis* v. *Drake*, 8 Allen, 161. *Fletcher* v. *Cary*, 108 Mass. 475. The argument that, if the covenantee upon such eviction may recover his full damages, he may keep them and not devote them to the payment of the mortgage debt, leaving the covenantor still personally liable thereon, is one of force; but it is equally true that if the covenantee cannot recover his full damages when a step is taken, which, if not arrested, must deprive him of his estate, he may lose it simply because by reason of the mortgage upon it he may be without the means of raising money upon his only security. The covenantor can avoid this difficulty by doing what he ought, namely, paying the debt at any time before judgment, thus reducing the damages to those merely nominal.

The rule of damages, as given by the court, was also correct. The general rule is that, where the grantee becomes seised, the estate having passed by force of the conveyance, and is after-

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wards evicted by a paramount title, the value of the estate at the time of eviction is the measure of damages. *Gore* v. *Brazier*, 3 Mass. 523, 543. *Norton* v. *Babcock*, 2 Met. 510. It has been held, however, in favor of the covenantor, that when the mortgage is less than the value of the land, and it would be plainly for the interest of the holder of the equity of redemption to redeem, the covenantee on such eviction shall recover only the amount of the mortgage, with interest, and not the full value of the estate. *Tufts* v. *Adams*, *ubi supra*. *White* v. *Whitney*, *ubi supra*.

The plaintiff also claimed to recover of the defendant for breach of the agreement in the deed of the Hyde Park estate to the defendant, which was accepted by the defendant, and contained this clause: "Subject to mortgages amounting to $6500, which the grantee hereby assumes and agrees to pay, and all interest now due on existing mortgages on said property, together with the taxes due on the same."

For the debt secured by the mortgage the plaintiff was liable, and the question presented is whether the plaintiff is entitled to recover nominal damages only, as contended by the defendant, or whether he may recover the amount of a mortgage upon the estate of $1500, with interest, which neither party has paid. The precise question involved here was raised in *Brewer* v. *Worthington*, 10 Allen, 329, but it was not there necessary to decide it. If the agreement is to be treated as one merely to indemnify the plaintiff against any loss or damage by reason of this mortgage, it would be necessary to show that he had been in some measure damnified thereby. *Little* v. *Little*, 13 Pick. 426. But there is no reason why an agreement may not be made which shall bind the party so contracting to pay the debt which another owes, and thus relieve him or his estate from it, and, if the promise thus made is not kept, why the promisee should not recover a sum sufficient to enable him so to do. Such is the construction to be given to the agreement in the case before us. As a consideration for the property conveyed to him, the plaintiff conveyed the Hyde Park estate to the defendant, who contracted not to indemnify the plaintiff against, but to pay the mortgages upon it, and, if he has failed to do this, the plaintiff should be entitled to recover the amount which the defendant thus agreed

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to pay. It is a portion of the consideration money due the plaintiff, which he was to receive by payment of a debt for which he was liable, which he thus recovers, when the defendant fails to perform his promise. That the plaintiff should be kept subject to a debt from which the defendant agreed to relieve him is a continuing injury for which a sum of money which will enable him to discharge it is an appropriate remedy in damages.

That a promise to pay a debt due from the promisee, even where it has not been paid by him, is one upon which an action may be maintained and damages recovered to the amount of such debt, is held by many authorities. *Holmes* v. *Rhodes*, 1 B. & P. 638. *Cutler* v. *Southern*, 1 Saund. 116, Wms.' note. *Toussaint* v. *Martinnant*, 2 T. R. 100. *Martin* v. *Court*, 2. T. R. 640. *Hodgson* v. *Bell*, 7 T. R. 97. *Thomas* v. *Allen*, 1 Hill, 145. *Loosemore* v. *Radford*, 9 M. & W. 657. *Penny* v. *Foy*, 8 B. & C. 11. In *Lethbridge* v. *Mytton*, 2 B. & Ad. 772, the defendant, by a settlement made upon his marriage, conveyed an estate upon certain trusts, and covenanted with the trustees to pay off incumbrances on the estate to the amount of £19,000, within a year, and it was held, upon his failure to do so, that the trustees were entitled to recover the whole £19,000 in an action of covenant, although no payment had been made by them, and nc special damage was laid or proved. Whether the contracts in some of these cases were anything more than contracts of indemnity, and therefore whether there could under our decisions have been any recovery, might perhaps be questioned. *Cushing* v. *Gore*, 15 Mass. 69. *Little* v. *Little*, *ubi supra*. That, however, need not now be considered, as we treat the agreement before us as one not for indemnity merely, but for payment. Nor is it important that the cases above cited are those in which the promisor agreed to pay on a particular day, or within a specified time. That cannot affect their application. An agreement to pay a debt, no time being specified, is an agreement to pay it when due, or forthwith, if it be already due. Here it appears that the promise was made on August 19, 1872, that the mortgage debt which the defendant was to assume and pay became due on September 1, 1872, and that the action was brought on March 10, 1873. That an action may be brought upon a promise to pay a debt due from the promisee, and, although he has not paid the same, full dam-

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ages recovered, is recognized clearly by the case of *Goodwin* v. *Gilbert*, 9 Mass. 510. The question is not there discussed in the opinion of the court, which treats another inquiry as the only one important in the case, but, having disposed of that in favor of the plaintiffs, judgment was rendered for the full sum.

There is an embarrassment undoubtedly where the agreement is to pay a debt due from the promisor as well as the promisee. It is similar to that heretofore considered, where there is an eviction by one holding a mortgage title, and the covenantee is allowed to recover in damages the amount of the mortgage upon which the covenantor is personally liable. As the Hyde Park estate, now the property of the defendant, is charged with the payment of the mortgage debt, if the plaintiff should not devote the sum recovered by him to its payment, the defendant might hereafter, in order to relieve his property, be compelled to pay the amount a second time. There is no mode, at law, by which this difficulty can be avoided, and the plaintiff enabled to receive the benefit of his contract. *Loosemore* v. *Radford, ubi supra.* Perhaps in equity, where a proper case for its interference was shown, a remedy would be afforded, that would secure the party paying under such circumstances from having the payment made by him devoted to any other object than that which would relieve him or his estate from further responsibility. However this may be, the want of elasticity in the forms of the common law, which does not enable us to make such a decree here as would guard the rights of all parties, should not prevent us from giving to the plaintiff the benefit of the contract which he has made, or compel him to remain subject to the burden of the debt, which the defendant has agreed to extinguish. As was suggested upon the other part of the case, the defendant may, if he will, perform his agreement and pay the debt at any time before final judgment, and the damages then to be recovered will be nominal only.

The other exceptions argued by defendant may be briefly disposed of.

Whether the bargain, which there was evidence tending to show had been made for an exchange of certain real estate in Hyde Park and a house on Shawmut Avenue, both owned by the plaintiff, for an estate in West Roxbury, owned by the defendant, had ever been carried out and the deeds delivered was a mat-

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ter in dispute at the trial, and evidence that, after the date when the plaintiff claimed the deeds to have been delivered, the defendant had treated the estate on Shawmut Avenue as his own, legitimately tended to show that such bargain had been actually completed, although the suit brought by the plaintiff did not relate to an alleged breach of covenant as to that estate.

There was evidence that the signature of Lucretia D. Durgin, wife of the defendant, who released thereby her right of dower and of homestead in the West Roxbury estate, had been made before any description had been written in the deed, and that she never saw it and did not redeliver it afterwards. But even if this would render the deed invalid as to her, it would not relieve the defendant from the covenants in the deed which bound him only. *Exceptions overruled.*

THOMAS UPHAM, trustee, *vs.* HARRIET M. EMERSON & another.

Suffolk. Nov. 16, 1875. — Feb. 29, 1876. COLT & LORD, JJ., absent.

A testator left property in trust to pay one third the income to his widow for life, and the other two thirds to his daughters, and in case of the death of either daughter, her share was to be paid to her heirs. The widow waived the provisions of the will, under the St. of 1861, *c.* 164. *Held*, on the death of a daughter, that the widow, although an heir of the daughter, could take no beneficial interest, as such heir, under the will.

A testator devised all his estate, real and personal, to a trustee in trust to pay of the net income thereof one third to the wife of the testator during her life; and the remaining two thirds, and, after the death of the wife, the whole of said net income, to his daughters A., B. and C., during their lives, and, after the death of one or more of them, to pay over the proportion of said net income, to which said deceased would have been entitled if living, to the legal heirs of such deceased; and, upon the death of the wife and all the daughters, to convey all the said real and personal property in fee to the legal heirs of the daughters, in equal proportions, by right of representation. The testator left a widow, two daughters by a former wife, one of whom was the daughter A. named in the will, and one daughter by his then wife, who was the daughter C. named in the will. After the death of the testator, and in the same year, A. died without issue, and C. afterwards died without issue. The wife of the testator seasonably waived the provisions of the will in her favor, under the St. of 1861, *c.* 164. *Held*, that after the widow had received the personal estate to which she was entitled, and one third of the income of the real estate as dowress, the remaining two thirds of the income of the real estate, and the whole income of the remaining personal estate, were to be

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divided, upon the death of A., between the surviving sisters equally, and that upon the death of C. the sister still surviving should receive three fourths of the whole income, the remaining one fourth to be added to the income afterwards to be distributed.

BILL IN EQUITY by the executor of, and trustee under, the will of William P. Emerson, against Harriet M. Emerson, the widow of the testator, and Helen W. Beseler, his daughter, to obtain the instructions of the court. The case was reserved by *Devens*, J., for the consideration of the full court, upon the bill and answers. The facts of the case appear in the opinion.

O. Stevens & H. Stevens, for the widow.

S. B. Allen & J. D. Long, for the daughter.

DEVENS, J. William P. Emerson died April 19, 1871, leaving a widow, Harriet M. Emerson, two daughters, Helen W. Beseler, wife of William Beseler, and Adelaide A. Emerson, children by a former wife, and Emily U., daughter by said widow, and no other issue. By the will, all the estate, real and personal, was devised and bequeathed to the trustee in trust to pay of the net income thereof one third to the wife of the testator, Harriet M. Emerson, during her life, and the remaining two thirds, and, after the death of the widow, the whole of said net income, to the daughters Helen, Adelaide and Emily, in equal shares, during their lives, and, "after the death of one or more of them, to pay over the proportion of said net income, to which such deceased would have been entitled if living, to the legal heirs of such deceased; and, upon the death of my wife and all of my said daughters, to convey assign and transfer all my said real and personal property to the legal heirs of my said daughters, in equal proportions, by right of representation, to have and to hold to them, their heirs and assigns, forever."

After the death of the testator, and in the same year, Adelaide died without issue, and Emily died without issue in April, 1875. The widow in due season waived the provisions of the will in her favor. By this waiver, the rights of the widow in the estate of her deceased husband, both real and personal, were the same as those which she would have had if he had died intestate, St. 1861, *c.* 164, subject to the limitations imposed by that statute, which in no way affect the present inquiry. Such a waiver must be treated as depriving her of any beneficial interest under and by virtue of the provisions of the will.

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Since the death of Adelaide, she not being a child of the widow, the share of income to which she would have been entitled if living has been divided between her surviving sisters. Gen. Sts. c. 91, § 5. To this, neither the widow nor surviving sister objects, and it was undoubtedly correct. It is now contended, on behalf of the widow, that the proportion of the income to which Emily would have been entitled if living, and which she has received since the death of her sister of the half blood, Adelaide, should be hereafter divided between herself and the surviving sister, while the latter claims the whole of such income.

The provision of the will as to the payment of the income must be construed as directing the income of each share to be paid, at the decease of each daughter, to those who should be at that time her legal heirs, and who are then to be ascertained. The widow, in reference to her daughter, is properly included within the term "heirs." Gen. Sts. c. 91, § 1. But if she is to take at all, it must be as a purchaser under the will. She can take nothing in this income by descent from her daughter; that daughter's estate terminated with her life, and there was nothing to be inherited by any one. The widow is one of a class of persons who are to take as independent objects of the testator's gift, and the term used indicates those who, upon the occurrence of the contingency of the decease of the daughter, are to take the income as such. *Clarke* v. *Cordis*, 4 Allen, 466. *Loring* v. *Thorndike*, 5 Allen, 257.

If the widow had been expressly named as one of those who might be entitled to take, as if the will had provided that in case of the death of either sister without issue, the share of income directed to be paid to her should be thereafter paid to her mother and surviving sister, in equal parts, it would hardly be contended that the mother must not take, if at all, by force of the will; and yet, while the language might then be more direct and explicit, the same idea is expressed here with entire clearness. It is not necessary to hold that the widow, by renouncing the provisions in her favor, is to be held to have renounced the benefits which she might receive by reason of her relation to some devisee or legatee under the will; so that if there had been an absolute devise or legacy to her daughter, she would be prevented by her waiver

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from receiving what she would otherwise be entitled to as heir No such case is here presented, but her waiver must be deemed to deprive her of her right to take as one of a class who are to take by virtue of the will, and who have been described simply by the relation in which they stand to her daughter. She therefore is not entitled to half of the income to which Emily was entitled.

In regard to the claim of Helen W. Beseler to the whole of the income, to recur to the illustration used above, it must be treated as if she and her mother had been named as those who were to take the income of the share of Emily in case of her decease; and thus considering it, her claim to more than one half the income of Emily's share cannot be supported. If the widow were not living, this would pass to her, as she would then constitute the whole class who were entitled to take; but as one of the class is living, and entirely able to take, except for the reason that she has waived the provision entitling her to do so, that waiver cannot be interpreted as being for the benefit of the other. Where a devise or bequest is made to a number of persons as tenants in common, if one of them dies in the testator's lifetime, his share does not pass, because, having given to each a certain proportion of his property, it would not be consistent with the testator's declared intention to give to the survivors a larger proportion; and where there is a bequest to more persons than one, by words showing that their enjoyment of the same is to be several and not joint, the share of one who dies before the testator does not pass, but remains as undevised estate. *Lombard* v. *Boyden*, 5 Allen, 249. The same principle is applicable here, and that is that, having received all to which she was entitled in the contingency that has occurred under the will, Helen is not to receive more because the bequest to another has failed. What was thus bequeathed must pass into and be added to the remainder, which is to be distributed at the decease of the widow and daughters. In the case of a lapsed legacy, it is the remainder of the estate which is to receive the benefit of it, there being no person capable of taking it; so here, neither the widow nor the daughter Helen being entitled to take the share of income appropriated to the widow, — the one, because she has waived the provisions of the will; the other, because the contingency when she can do

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so has not arrived, — it must be added to that which is hereafter to be distributed.

It is not important to discuss whether the effect of the waiver by the widow has operated to increase or diminish the share of income to which Helen would otherwise be entitled. The testator must have been aware that it was in the power of his widow, by waiving the provisions of the will, to receive the portion of the estate to which she would have been entitled if he had died intestate, and must be deemed in what he did to have contemplated it.

Applying the rules we have indicated to the case before us, after the widow had received the personal estate to which she was entitled, she would as dowress continue entitled to one third of the income of the real estate. Two thirds of the income of the real estate and the whole income of the remaining personal property would constitute the income to be divided between the daughters. Until the death of Adelaide, this should have been divided into three parts, and each sister should have received one third of the whole. Upon the death of Adelaide, each surviving sister should have received one third and one half of the third which Adelaide would have received if living, or, differently expressed, one half of the whole income. Upon the death of Emily, the surviving sister, Helen, is to receive one half of the whole income and one half of that which Emily would have received if living, that is to say, three fourths of the whole income, while the remaining fourth of the income is to be added to the remainder, which is to be distributed hereafter.

Decree accordingly.

JOHN G. DAY *vs.* ASA H. CATON.

Suffolk. Nov. 19, 1875. — Feb. 29, 1876. COLT & LORD, JJ., absent.

In an action to recover the value of one half of a party wall erected by the plaintiff partly on his estate and partly on that of the defendant, the jury may, in the absence of an express agreement as to payment on the defendant's part, infer a promise to pay, if the plaintiff undertook and completed the wall with the ex

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pectation that the defendant would pay him for it, and the defendant had reason to know that the plaintiff was so acting with that expectation, and allowed him so to act without objection.

CONTRACT to recover the value of one half of a brick party wall built by the plaintiff upon and between the adjoining estates, 27 and 29 Greenwich Park, Boston.

At the trial in the Superior Court, before *Allen*, J., it appeared that, in 1871, the plaintiff, having an equitable interest in lot 29, built the wall in question, placing one half of it on the vacant lot 27, in which the defendant then had an equitable interest. The plaintiff testified that there was an express agreement on the defendant's part to pay him one half the value of the wall when the defendant should use it in building upon lot 27. The defendant denied this, and testified that he never had any conversation with the plaintiff about the wall; and there was no other direct testimony on this point.

The defendant requested the judge to rule that, "1. The plaintiff can recover in this case only upon an express agreement."

"2. If the jury find there was no express agreement about the wall, but the defendant knew that the plaintiff was building upon land in which the defendant had an equitable interest, the defendant's rights would not be affected by such knowledge, and his silence and subsequent use of the wall would raise no implied promise to pay anything for the wall."

The judge refused so to rule, but instructed the jury as follows: "A promise would not be implied from the fact that the plaintiff, with the defendant's knowledge, built the wall and the defendant used it, but it might be implied from the conduct of the parties. If the jury find that the plaintiff undertook and completed the building of the wall with the expectation that the defendant would pay him for it, and the defendant had reason to know that the plaintiff was so acting with that expectation and allowed him so to act without objection, then the jury might infer a promise on the part of the defendant to pay the plaintiff."

The jury found for the plaintiff; and the defendant alleged exceptions.

H. D. Hyde & M. F. Dickinson, Jr., for the defendant.

F. W. Kittredge, for the plaintiff.

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DEVENS, J. The ruling that a promise to pay for the wall would not be implied from the fact that the plaintiff, with the defendant's knowledge, built the wall, and that the defendant used it, was substantially in accordance with the request of the defendant, and is conceded to have been correct. Chit. Con. (11th Am. ed.) 86. *Wells* v. *Banister*, 4 Mass. 514. *Knowlton* v. *Plantation No.* 4, 14 Maine, 20. *Davis* v. *School District in Bradford*, 24 Maine, 349.

The defendant, however, contends that the presiding judge incorrectly ruled that such promise might be inferred from the fact that the plaintiff undertook and completed the building of the wall with the expectation that the defendant would pay him for it, the defendant having reason to know that the plaintiff was acting with that expectation, and allowed him thus to act without objection.

The fact that the plaintiff expected to be paid for the work would certainly not be sufficient of itself to establish the existence of a contract, when the question between the parties was whether one was made. *Taft* v. *Dickinson*, 6 Allen, 553. It must be shown that, in some manner, the party sought to be charged assented to it. If a party, however, voluntarily accepts and avails himself of valuable services rendered for his benefit, when he has the option whether to accept or reject them, even if there is no distinct proof that they were rendered by his authority or request, a promise to pay for them may be inferred. His knowledge that they were valuable, and his exercise of the option to avail himself of them, justify this inference. *Abbot* v. *Hermon*, 7 Greenl. 118. *Hayden* v. *Madison*, 7 Greenl. 76. And when one stands by in silence and sees valuable services rendered upon his real estate by the erection of a structure, (of which he must necessarily avail himself afterwards in his proper use thereof,) such silence, accompanied with the knowledge on his part that the party rendering the services expects payment therefor, may fairly be treated as evidence of an acceptance of it, and as tending to show an agreement to pay for it.

The maxim, *Qui tacet consentire videtur*, is to be construed indeed as applying only to those cases where the circumstances are such that a party is fairly called upon either to deny or admit his liability. But if silence may be interpreted as assent where a

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proposition is made to one which he is bound to deny or admit, so also it may be if he is silent in the face of facts which fairly call upon him to speak. *Lamb* v. *Bunce*, 4 M. & S. 275. *Conner* v. *Hackley*, 2 Met. 613. *Preston* v. *American Linen Co. ante*, 400.

If a person saw day after day a laborer at work in his field doing services, which must of necessity enure to his benefit, knowing that the laborer expected pay for his work, when it was perfectly easy to notify him if his services were not wanted, even if a request were not expressly proved, such a request, either previous to or contemporaneous with the performance of the services, might fairly be inferred. But if the fact was merely brought to his attention upon a single occasion and casually, if he had little opportunity to notify the other that he did not desire the work and should not pay for it, or could only do so at the expense of much time and trouble, the same inference might not be made. The circumstances of each case would necessarily determine whether silence with a knowledge that another was doing valuable work for his benefit, and with the expectation of payment, indicated that consent which would give rise to the inference of a contract. The question would be one for the jury, and to them it was properly submitted in the case before us by the presiding judge. *Exceptions overruled.*

Benjamin Derby *vs.* Framingham and Lowell Railroad Company.

Middlesex. Jan. 13. — Feb. 14, 1876. Colt & Endicott, JJ., absent.

A railroad corporation, desiring to take lands outside the limits of its road, filed its location over a lot of land whose owner afterwards conveyed a part of the lot to the corporation. The county commissioners, subsequently, on the petition of the corporation, ordered that it have leave to take the land included within the location. *Held*, under the Gen. Sts. c. 63, § 19, providing that railroad corporations shall not take lands without the limits of their railroad without the consent of the owner, unless the county commissioners first prescribe the limits within which the same may be taken, that the corporation acquired no right in the land under its location, and that the corporation was bound, under the Gen. Sts. c. 63, § 43, to erect suitable fences between the land conveyed to it and the rest of the lot.

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PETITION IN EQUITY, under the Gen. Sts. c. 63, §§ 43, 44, to compel the respondent to erect suitable fences between its land and the land of the petitioner. The answer alleged that the land which the petitioner desired to have separated by a fence was owned by the respondent. The case was submitted to the judgment of the court upon an agreed statement of facts, in substance as follows:

On March 23, 1872, the petitioner was the owner of a certain tract of land in Concord, containing about ten acres. On that date, the respondent filed in the office of the clerk of the county commissioners of Middlesex County its location over the whole of said tract of land, and on the same day presented a petition to the county commissioners to approve of and confirm the location of its road over the land of the petitioner. On October 10, 1872, the petitioner conveyed to the respondent a portion of the lot, containing four acres. On July 23, 1873, the county commissioners ordered that the respondent have leave, in accordance with its petition, to take the lands embraced in the location filed by it. The petitioner, who owned no land adjoining the land embraced in the alleged location, contended that the respondent should erect a fence between the parcel of land conveyed by his deed and the remainder of the tract embraced in the alleged location. *Wells*, J., entered a decree for the petitioner; and the respondent appealed.

S. Hoar, for the petitioner.

G. A. Torrey, for the respondent.

GRAY, C. J. A railroad corporation has no right to take and appropriate to its own use lands of any person without a strict compliance with the provisions of the statutes which authorize it so to do. The Gen. Sts. c. 63, § 19, expressly provide that lands without the limits of its railroad shall not be taken without permission of the owner, unless the county commissioners "first prescribe the limits within which the same may be taken." As no such limits were prescribed by the commissioners before the respondent in this case filed its location over the land in question, it acquired no right, against the will of the owner, in any part of the land outside the limits of its road; so much of this land as had not been conveyed to the corporation by the owner remained his; and no reason is shown why he should not have a decree

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under the Gen. Sts. *c.* 63, §§ 43, 44, compelling the corporation to erect suitable fences between his land and its railroad.

Decree affirmed.

ATTORNEY GENERAL *vs.* CITY OF CAMBRIDGE.

Middlesex. Jan. 19. — Feb. 14, 1876. COLT & ENDICOTT, JJ., absent.

The provisions of the St. of 1866, *c.* 149, requiring all persons filling up flats by authority of the Legislature to submit their plans to the approval of the board of harbor commissioners, and to make compensation for the tide water thus displaced, do not apply to work done by the boards of mayor and aldermen of Cambridge and Somerville in filling up the flats in pursuance of the power conferred upon them by the St. of 1873, *c.* 304, and according to the plan devised by the harbor commissioners, acting jointly with the state board of health, under the St. of 1872, *c.* 353.

INFORMATION IN EQUITY, filed September 10, 1874, by the attorney general, at the relation of the harbor commissioners, under the St. of 1866, *c.* 149, § 5, to prevent the defendant from filling up the flats and basin of that portion of Miller's River which lies within the city of Cambridge. At the hearing before *Morton*, J., upon the information, answer and proofs, the attorney general contended that the St. of 1866, *c.* 149, §§ 4, 5, applied to the work of filling the basins, channel and flats of Miller's River under the St. of 1873, *c.* 304; and the defendant contended that the St. of 1866 did not so apply, and that the city of Cambridge was not in any event answerable. The judge reported the case for the consideration of the full court.

D. E. Ware, for the Attorney General.

J. W. Hammond, for the defendant.

GRAY, C. J. The provisions of the St. of 1866, *c.* 149, requiring all persons, filling up flats by authority of the Legislature, to submit their plans to the approval of the board of harbor commissioners, and to make compensation for the tide water displaced, cannot be deemed to have been intended to apply to the filling up of the tract of flats in the cities of Cambridge and Somerville, described in the St. of 1873, *c.* 304. 1st. The work was to be done, not by private individuals for their own benefit, but under the direction of the boards of mayor and aldermen of

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the two cities, for the abatement of a nuisance and the preservation of the public health. 2d. It was but the carrying out of a plan which had been devised by the board of harbor commissioners, acting jointly with the state board of health, under authority of the St. of 1872, *c.* 353. 3d. The St. of 1873, *c.* 304, contains no reference to the requirements of the St. of 1866, *c.* 149, as has been usual whenever works to be done by municipal authorities were intended by the Legislature to be governed by such requirements. Sts. 1867, *c.* 324; 1868, *c.* 326; 1869, *cc.* 78, 432, 447; 1871, *c.* 273; 1873, *cc.* 129, 130, 136.

Information dismissed.

MARY SMITH *vs.* ELLEN McCARTY & others.

Middlesex. Jan. 11. — Feb. 17, 1876. COLT & ENDICOTT, JJ., absent.

The judge, before whom a writ of dower was tried without a jury, found as a fact that the land described in the writ was conveyed to the demandant's husband; that he, on the same day, mortgaged it to a third person to secure his note to such person for money procured of him to pay for the land; and that the demandant did not join in the mortgage deed. The judge ruled, on these facts, that the demandant was entitled to dower. *Held*, that the facts stated did not conclusively prove that the seisin of the husband was instantaneous only.

WRIT OF DOWER by the widow of Barney Smith, dated February 4, 1871, against Ellen McCarty, William Smith and Lawrence Smith. Trial in the Superior Court, without a jury, before *Brigham*, C. J., who found the following facts:

The premises in which the demandant claims dower in this action consist of about one half of an acre of land in Framingham with a dwelling-house thereon, which was conveyed to Barney Smith by a warranty deed of George Warren on November 30, 1858; mortgaged to Elizabeth Dawson on November 30, 1858, to secure payment of Barney Smith's note of $100 procured by him of her for the purpose of paying for the said land, and conveyed by Barney Smith by his warranty deed subject to the said mortgage to Alexander R. Esty on January 6, 1860, and reconveyed by Alexander R. Esty by quitclaim deed, to Barney Smith on January 9, 1860. On September 26, 1861 the

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tenant Ellen McCarty paid from the earnings of her labor the sum due upon the mortgage of Barney Smith to Elizabeth Dawson, for which a receipt was given on the back of the mortgage, and, in consideration of that payment, Walter Adams, administrator of the estate of Elizabeth Dawson, deceased, assigned the mortgage to the tenant Ellen McCarty, on May 10, 1875. Barney Smith, by his warranty deed of February 15, 1870, conveyed the premises to his son, William Smith, (deceased before service of the demandant's writ) and Lawrence Smith, but the demandant did not join in this deed.

The demandant on October 1, 1870, demanded in writing of William Smith and Lawrence Smith dower and homestead in the premises.

Upon the foregoing facts, the judge ruled that the demandant was entitled to dower in the premises described in the writ, and ordered judgment for her; and the tenants alleged exceptions.

H. L. Hazelton & W. Adams, for the tenants.

A. Cottrell, for the demandant.

MORTON, J. It appears by the bill of exceptions that the land in which the demandant claims dower was conveyed to her husband by George Warren on November 30, 1858, and that on the same day her husband mortgaged it to Elizabeth Dawson, to secure the payment of his note of one hundred dollars procured by him of her for the purpose of paying for this land. But this does not necessarily show that he had only an instantaneous seisin. It must be shown that the deed to him and the mortgage by him were parts of one and the same transaction. *Webster* v. *Campbell*, 1 Allen, 313. *Hazleton* v. *Lesure*, 9 Allen, 24. *King* v. *Stetson*, 11 Allen, 407.

The presiding judge, who tried this case without a jury, may have found upon the evidence before him that the deed and mortgage were not parts of one act or transaction, and therefore that the seisin of the demandant's husband was not instantaneous, in which case the demandant, as she did not sign the mortgage, is entitled to dower in the whole estate. Without considering the other point taken by the demandant, that the mortgage was paid and discharged, these exceptions cannot be sustained because the bill does not show any error of the court below in matter of law. *Exceptions overruled*

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RELIEF W. CRAFTS & others *vs.* CHESTER JUDSON & another.
CHESTER JUDSON & another *vs.* J. C. STANTON & others.

Middlesex. Jan. 18. — Feb. 29, 1876. COLT & ENDICOTT, JJ., absent.

Land was sold bounded on a private way belonging to the grantor. No way was then laid out, though a culvert was built by the grantor across a piece of the land retained by him and a fence erected. A plan of the land showing a way had been previously recorded in the registry of deeds, but the deed made no reference to the plan. *Held*, that the plan did not control, and that the location of the way was a matter of fact, in determining which the conduct and declarations of the parties, the nature and position of the fence and culvert, and the purposes for which they were built were competent evidence.

TWO BILLS IN EQUITY. The first was brought by Relief W. Crafts, Walter Crafts, J. C. Stanton, Charles F. Tuttle and Patrick Shea, the owners of land lying on the westerly side of a private way in Newton, against Chester Judson and Christopher Needham, owners of land on the east side of said way, to restrain the defendants from obstructing the way.

The second was brought by Chester Judson and Christopher Needham against J. C. Stanton, Patrick Shea and Charles F. Tuttle, to restrain the defendants from obstructing the same way.

The lands of the plaintiffs and of the defendants were separated by a private way forty feet wide, running northerly from Washington Street, and the question in dispute was whether the way, the points of the beginning of which were not in controversy, ran north 28¾° west or north 31¾° west.

The cases were referred to a master who found the facts to be as follows: In 1846, Judson was the owner of all the land now owned by the parties to these suits. Subsequently he divided his land into lots and made a plan thereof, which was publicly exhibited in Newton and recorded in the Middlesex Southern District Registry of Deeds, on August 23, 1846. This plan showed the way in dispute running in the direction, which the defendants in the first case contend is the true direction.

On August 1, 1849, Judson gave to Nathan Crafts, through whom the plaintiffs in the first case claim, a bond for deed of land in Newton, and on November 1, 1851, conveyed the land to him, by a deed describing the land as lying on the northerly side of Washington Street and bounded "southerly by Washington

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Street; westerly by land of W. Parks; northerly on land of Andrew J. Allen; and easterly by my own land, (or by the line of a road laid out through my land from Washington Street. northerly to Andrew J. Allen's line.") The deed also contained the following clause: "The road laid out by me from Washington Street, northerly to Andrew J. Allen's line, and being the eastern boundary of the above described land, is to be kept in order by parties who may own and abut on said road while it remains a private way, reserving to myself the right to allow it to become a public road, should I see fit so to do. Said Crafts, his heirs and assigns to have the privilege of said road in common with me, my heirs and assigns."

Neither the bond nor the deed contained any reference to the plan; nor was the private way then laid out; though there was evidence that a copy of the plan was given to Crafts before he bought. A brook ran through the land conveyed to Crafts, and also through the remaining land of the grantor. After the bond was given and before the deed was executed, Judson built a culvert, for the brook to run through, across what the plaintiffs in the first case contend is the way, and put up a fence on the line thereof. This fence, Judson testified, was put up without making any measurements and for the temporary purpose of pasturing cattle. Part of the fence remained until 1862, and part until 1866. No question as to boundaries arose in the lifetime of Nathan Crafts, who died in 1857. The report of the master also set forth certain deeds of Judson of the land on the east of the way, bearing on the question of fact where the line of the way was on that side, and also conflicting testimony as to declarations made by Judson in regard to the location of the way.

Hearing before *Morton*, J., who decided that the location of the private way was the same as laid down on the recorded plan, and that the location had not been altered by the fence and culvert; and entered a decree for the defendants in the first case, and for the plaintiffs in the second; and the adverse parties appealed.

I. D. Van Duzee, for the appellants.

N. C. Berry, for the appellees.

DEVENS, J. At the time when a bond for a deed was given by Judson to Nathan Crafts, the land agreed to be conveyed was

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described by him as bounded "easterly on my own land to the line of a road which I have laid out," &c. No road was then actually constructed upon the land or indicated thereon by fences or culverts. Judson had previously made a plan of his estate upon which a road was exhibited, which plan had, before the date of the bond, been recorded in the Middlesex Registry of Deeds, and there was evidence that a copy of it had been given to Nathan Crafts. No reference, however, was made to the plan in the deed subsequently given by Judson conformably to the obligation in his bond. The position of the road described in the deed was, therefore, to be determined as a question of fact by the master, and afterwards by the judge before whom the cases were heard. Whether it was the road as indicated by the plan, or whether it was one indicated by a fence and culvert erected subsequently to the date of the bond, was the matter in dispute. Upon this inquiry the conduct and declarations of the parties, the nature and position of the fences and culvert, the purposes for which they were built, were put in evidence, and the evidence in relation to them was conflicting. Upon this evidence it might properly have been found that the position of the private road referred to in the deed was the same as that shown by the plan, and not that indicated by the fence and culvert, and we see no reason to disturb the finding. *Decrees affirmed.*

JAMES LAING *vs.* ALFRED L. BARBOUR.

Middlesex. Jan. 19. — Feb. 29, 1876. COLT & ENDICOTT, JJ., absent.

A woman died seised of personal estate and of real estate, part of which she had bought prior to the date of the will, and the rest had been bequeathed to her by her brother. Her will, after certain specific bequests, constituted A. her "residuary legatee," and proceeded as follows: "The property bequeathed me by my brother, and the property I have in expectation from my sister, and any other property that may come into my possession, I will, and ordain, and bequeath," one fourth to A., and three fourths to certain other persons. *Held*, that it was the intent of the testatrix to dispose of all her estate; and that A. took, under the term "residuary legatee," all the real estate not bequeathed to the testatrix by her brother.

CONTRACT for breach of an agreement to purchase a parcel of land in Newton. The answer admitted the agreement, but alleged that the plaintiff was not seised in fee of the land. The

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case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court, on appeal, on agreed facts, in substance as follows:

In May, 1862, Sarah H. Ward bought and became possessed of this land of the assignee in insolvency of the estate of her husband, Andrew H. Ward, and she held it until her decease October 6, 1873. She left a husband and several children. Her will, dated July 22, 1862, and duly admitted to probate, after certain specific bequests of personal property, proceeded as follows:

"I give to my son, Joseph W. Ward, all the remaining part of my furniture not previously disposed of, consisting of looking glasses, pictures, crockery, bedsteads, feather beds, bolsters, pillows, mattresses, blankets, comforters, bed-quilts, portable mahogany wash sinks and wash stands, tables, bureaus, sideboard, portable closets, wardrobe, fire grates and stoves, my own personal library, and everything belonging to me, of household furniture and stuff, not otherwise disposed of.

"I constitute and appoint Joseph W. Ward my residuary legatee.

"The property bequeathed me by my brother, Hon. David Henshaw, and the property I have in expectation from my sister, Mrs. Elizabeth Dodge, and any other property that may come into my possession, I will, and ordain, and bequeath, as follows, viz. that it may all be divided equally into four parts and shares, one fourth share or part to Joseph Walter Ward, and his heirs; one fourth share or part to Andrew Henshaw Ward, Jun'r., and his heirs; one fourth share or part to David Henshaw Ward and his heirs; one fourth share or part to Frances Antoinette Danforth and her heirs."

The land in question was not included in the property bequeathed to her by her brother, David Henshaw, nor did she ever have any of it in expectation from her sister, Elizabeth Dodge. A part of the property bequeathed to the testatrix by her brother, David Henshaw, was real estate of which she was seised at the date of the will and of which she died seised.

The plaintiff's title comes through mesne conveyances from Joseph W. Ward named in the will, the son of Sarah H. Ward who derives his title solely from this will. If by the will Sarah

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H. Ward's title to the land passed to Joseph W. Ward, judgment was to be entered for the plaintiff for the sum of fifty dollars; otherwise for the defendant.

J. W. Hammond, for the plaintiff.

C. G. Pope, for the defendant.

DEVENS, J. That it was the intention of the testatrix to dispose of both her real and personal estate, is sufficiently indicated by the clauses of the will which dispose of the property bequeathed to her by her brother and "any other property that may come" into her possession. The word "property" includes real estate, and there was real estate upon which the first of these clauses could operate. Nor would the use of the word "bequeathed," in describing the property which came to her from her brother, instead of the words "devised and bequeathed," show an intention to confine the operation of the will to personal property only, especially when used in connection with the subsequent clause. *Doe* v. *Lainchbury*, 11 East, 290. *Doe* v. *Morgan*, 6 B. & C. 512. *Edwards* v. *Barnes*, 2 Bing. N. C. 252. *Hunt* v. *Hunt*, 4 Gray, 190, 193.

When, therefore, the testatrix, owning real estate other than that which came to her from her brother, constitutes Joseph W. Ward her "residuary legatee," it must be considered that by this term she intended that the residuum of her estate, both real and personal, should pass to him. The words she used were sufficient for this purpose. *Hunt* v. *Hunt*, *ubi supra*. *Hardacre* v. *Nash*, 5 T. R. 716. *Day* v. *Daveron*, 12 Sim. 200. *Evans* v. *Crosbie*, 15 Sim. 600. *Davenport* v. *Coltman*, 9 M. & W. 481.

Joseph W. Ward being entitled, under the will of his mother, to the real estate which the plaintiff agreed to sell, it follows that the plaintiff could make a good title to it by virtue of the conveyance to him. He is, therefore, entitled to judgment.

Judgment for the plaintiff.

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INHABITANTS OF EASTHAM *vs.* CORNELIUS ANDERSON.

Barnstable. Jan. 25. — Feb. 29, 1876. ENDICOTT & DEVENS, JJ., absent.

A warrant for a town meeting contained an article, "to see if the town will sell the Herring Brook for three years or more, as the town may deem proper, to the highest bidder." Under this article, Herring Brook was sold to the defendant for three years, for $170 a year, he being the highest bidder. *Held*, in an action by the town to recover the price agreed, in which it appeared that the defendant had enjoyed the fishery, that the sale by the town was in the nature of a lease, and that the defendant was estopped to deny the title of the town or its right to sell the fishery, unless he was evicted or interrupted by some one having a paramount title; and that the questions how far the brook was understood to extend, and whether it was navigable where the defendant took fish, were for the jury.

The St. of 1871, *c.* 281, § 2, providing that "the proprietor of any unnavigable tidal stream, where the same empties into salt water, and in which fishes are lawfully cultivated or maintained, shall control the fishery of said stream within his own premises, and also beyond and around the mouth of said stream, so far as the tide may ebb: provided, it does not ebb more than eighty rods," applies only to cases where the waters of a stream are inclosed by the proprietor for the purpose of cultivating fishes.

The lessee from a town of the right of fishery in a brook is liable for the stipulated rent, if he has enjoyed the premises, notwithstanding the statute of frauds, although his promise is not in writing.

CONTRACT. The declaration was as follows: "And the plaintiff says, that, being the lawful owner of a certain herring fishery in said town of Eastham, which by law the plaintiff had the right to manage, control, have, use and dispose of, the defendant purchased of the plaintiff the right to have said fishery, and the beneficial use of said fishery, and the profit to take the fish in said fishery for the fishing season of the year 1873, and agreed to pay therefor to the plaintiff the sum of $170, which the defendant owes the plaintiff."

The answer contained a general denial, and also denied that the plaintiff was ever the lawful owner of any herring fishery in the town of Eastham; that the plaintiff ever had the right to manage, control, have, use or dispose of any herring fishery in said town; that he purchased of the plaintiff the right to have any fishery or the beneficial use of any fishery or the profit, or the right to take fish in any herring fishery in said town of Eastham for the fishing season of the year 1873. The answer also set

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up that the herring fishery, alleged by the plaintiff to have been purchased of it by the defendant, belongs to and is owned by the heirs of Joshua Cole of said Eastham, deceased; that the sale of the herring fishery, alleged to have been made to him by the plaintiff, was not in writing, and that said alleged sale was void under the Gen. Sts. *c.* 105, § 5.

Trial in the Superior Court, before *Bacon*, J., who allowed a bill of exceptions in substance as follows:

The plaintiff introduced as evidence of the sale the following extracts from the records of the town of Eastham: "March 3, 1873. To see what the town will do with the Herring Brook. Voted to choose a com. of five to confer with the owners of the land near the Herring Brook. Voted that Philip Smith and Joshua Cole be added to the com. of last year on Herring Brook. March 24, 1873. To see if the town will sell the Herring Brook for three years or more, as the town may deem proper, to the highest bidder." The plaintiff also introduced the testimony of the auctioneer who sold the same in open town meeting, "that the defendant was the highest bidder at such sale, bidding $170 therefor, and that the same was struck off to him," and this was the only evidence of said sale.

The plaintiff also introduced evidence that the defendant had taken the fish from said Herring Brook, without interruption, during the fishing season of 1873, and also evidence that the most of the fish had been usually taken and were taken by the defendant below the edge of the bank or rising where the Herring Brook empties into the salt water or bay, and where the tide flowed into the outlet of said brook below the bank where the brook runs out, and continued through the beach shore and flats below the bank as the tide ebbed. The plaintiff also offered evidence tending to show that the brook and the fishing therein had existed as long as the memory of the oldest witness who was called, being seventy-four years of age, and there was evidence that the owner of the land through which the brook runs had never exercised or claimed any right of several fishery there before said sale. The plaintiff introduced no evidence of any right or title of said town of Eastham in said Herring Brook, except the foregoing.

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The defendant introduced evidence tending to show that he was prevented by one Joshua Cole, Jr., who claimed with other devisees of Joshua Cole, deceased, to be the owners of the premises over which, or through which, said brook runs from the pond to the shore or bay, and also evidence, that was not controverted, that he was forbidden by said Joshua Cole, Jr., from paying the town, and told by said Cole that he, Cole, should hold him responsible therefor; but it was controverted that he was prevented from taking the fish in said brook, and it was contended by the plaintiff that the intervention of Joshua Cole, Jr., was only by some arrangement between him and the defendant with a view to defeat the claim of the town in this action. The defendant also introduced evidence of the title of said Joshua Cole, Jr., and said other devisees to the land over which, or through which, said Herring Brook runs from the pond to the bay, as far as the edge of the bank where said bank meets the bay at high water. This evidence of the title of said Joshua Cole, Jr., and said other devisees as above stated, was not controverted. The defendant also introduced evidence that said Herring Brook is dry for some three months of each year, and also that the tide only flows into said brook above the rising or bank at extreme high water.

The defendant requested the court to instruct the jury: "1. That the plaintiff, under the pleadings and the evidence, must satisfy the jury that it owned or had title to said brook, and the right to manage and control the taking fish in the same, or it could not recover.

"2. That there was no evidence that the plaintiff owned or had any title to said brook.

"3. That as a matter of law, on the evidence, the term Herring Brook only embraced that portion between the pond and the edge of the bank or rising where the same empties into the bay.

"4. That there was no evidence that the said Herring Brook was a navigable stream.

"5. That if the jury were satisfied that the brook in question was an unnavigable stream, then the owner of the land over or through which the same runs has the exclusive right to take the fish within his premises and beyond and around the mouth of said stream, where the same empties into the salt water, as far as the tide ebbs and flows, provided it does not ebb more than eighty

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rods, unless the town proved title to the same, either by legislative grant or otherwise."

The judge refused to give any of the foregoing requests for instructions; and instructed the jury, against the objection of the defendant, that said sale by the town to the defendant was in the nature of a lease, and that under the pleadings and evidence the plaintiff was not bound to prove that it owned or had any title in said brook, or any right to manage, control or sell the right to take the fish therein; that the plaintiffs were entitled to a verdict upon the evidence in the case, unless the defendant satisfied the jury, upon the whole of said evidence, that he was prevented from taking the fish from said brook by the lawful owner or owners of said land and brook, and that the burden of proof was upon the defendant to show that he was so prevented; and declined to rule that the act of the lawful owner forbidding the defendant to pay the town, as he would be held responsible, would constitute such prevention, but left the question to the jury to determine whether he was so prevented by the owner; that the sale of said Herring Brook to the defendant, if proved, was in the nature of a lease, and that the defendant was estopped under the pleadings in this case from denying that the town of Eastham had any title in said brook, or the right to sell the fishery in the same; but if he took the fish, he must satisfy the jury, the burden of proof being on him, that he was prevented by the owner of said brook from taking the fish therein, and compelled to take the same under the owner of the land, and did actually take the same under said owner.

The defendant also requested the judge to instruct the jury that said sale of said brook to him was void under the statute of frauds, the same being for an interest in lands, and not in writing. The judge refused so to instruct the jury.

There was no other evidence in the case material to the foregoing rulings and requests to rule. The jury found for the plaintiff; and the defendant alleged exceptions.

H. P. Harriman, for the defendant.

G. Marston, for the plaintiff.

MORTON, J. The warrant for the meeting of the plaintiff town held March 24, 1873, contained the article, "To see if the town will sell the Herring Brook for three years or more, as

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the town may deem proper, to the highest bidder." Under this article, Herring Brook was sold in open town meeting to the defendant for three years, for $170 a year, he being the highest bidder. Though the warrant and the record speak of the sale of Herring Brook, there is no question that the right of fishing in the brook was intended and understood as the subject of the sale. It appeared at the trial that the defendant had taken the fish from Herring Brook during the fishing season of the year 1873, and the presiding judge ruled that the sale by the town was in the nature of a lease, and that the defendant was estopped to deny the title of the town or its right to sell the fishery, unless he was evicted or interrupted by some one having a paramount title.

We are of opinion that this ruling was correct. The case of *Watertown* v. *White*, 13 Mass. 477, is decisive of this point. That was an action, to recover the rent of a fishery, brought upon a contract similar to that proved in the case at bar, and it was urged, as one of the grounds of defence, that the plaintiff had not the right, or the exclusive right, to the fishery which was supposed by the parties when the contract was made. The court say: "The answer which has been made to this argument is, we think, conclusive. The defendant, having enjoyed the fishery by the permission of the plaintiffs, cannot be permitted, on this ground, to excuse himself from the payment of the stipulated rent. Such an evasion of a fair contract would be gross injustice, and a reproach to the law, if it were allowed. But the law is not liable to such a reproach. It is a well settled rule, that the tenant shall never be suffered to impeach his landlord's title. Thus, in an action for use and occupation, which is analogous to the case under consideration, the plea of *nil habuit tenementis* is not admissible. This rule is founded in good sense, wise policy, and the plainest principles of fair dealing. The plaintiff's right to the fishery cannot, then, be properly brought in question in this action. It is immaterial whether they have an exclusive right, a right in common, or no right at all."

In the case at bar, therefore, the defendant was estopped to deny the plaintiff's right to lease the fishery, and the first and second requests of the defendant for instructions, which were to the effect that the plaintiff must prove its title, were properly refused.

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The third and fourth requests involve matters of fact, and were properly refused. It was for the jury to say what was understood by the term "Herring Brook" in the contract, and whether it was navigable.

The fifth request was also rightly refused. It was based upon the theory that the owner of the land on the brook has the exclusive right to take fish around the mouth of the stream as far as the tide ebbs and flows, provided it does not ebb more than eighty rods. The defendant relies in support of this claim upon the St. of 1871, *c.* 281, but that statute applies only to cases where the waters of a stream are inclosed by the proprietors for the purpose of cultivating fishes, and has no application to the case at bar. The only other exception insisted on is that to the refusal of the court to rule that the sale or lease to the defendant was void under the statute of frauds, because there was no memorandum of it in writing, signed by the defendant. The ruling of the court was correct. As in other cases of parol leases, the defendant having enjoyed the premises, his promise to pay the stipulated rent, if by parol, is not void by the statute of frauds.

As no error in matter of law is shown, the plaintiff is entitled to retain its verdict. *Exceptions overruled.*

CHARLES W. RUSSELL *vs.* HORACE A. LATHROP.

Norfolk. Jan. 26. — Feb. 16, 1876. ENDICOTT & DEVENS, JJ., absent.

The Superior Court has no authority, under the St. of 1869, c. 438, to report a case before verdict to this court, for its opinion upon the whole course of the trial and upon the admissibility of every piece of evidence offered, without any ruling of the court below upon its competency, or stating that evidence with sufficient precision to enable its competency to be determined.

WRIT OF REVIEW of a judgment recovered by the defendant in review against the plaintiff in review on the following contract in writing, dated January 22, 1870, and signed by the plaintiff in review and James T. Frary:

"It is agreed between H. A. Lathrop of Sharon, and James T. Frary and Charles W. Russell of New York, that for services

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heretofore rendered by said Lathrop to said Frary and Russell, they shall procure from the Lamson & Goodnow Manufacturing Company for him a license to manufacture at his said Lathrop's works, in Sharon aforesaid, and not elsewhere, and sell three thousand dozens of cutlery, under the patent granted to Joseph W. Gardner in 1859, and assigned to the said company during the unexpired term of said patent; which license the said Lathrop has applied to and requested the said Frary and Russell to procure for him from said company; and further, that they will pay the royalty charged for said license by said company; and they also agree to pay said Lathrop three thousand dollars when and as soon as said company shall have obtained a decree or judgment establishing the validity of said patent; and said Lathrop agrees that he will use his best endeavors to aid in establishing the validity of said patent whenever he shall be called upon to do so by said Frary and Russell, or said company."

After the former decision in the case, reported 117 Mass. 424, the case was tried in the Superior Court, before *Dewey*, J., who reported the case, for the consideration of this court, in substance as follows:

The execution and delivery of the agreement, and a demand of payment by Lathrop upon Russell before bringing the present suit, were proved. The plaintiff also introduced in evidence the records of three suits in equity brought by the Lamson & Goodnow Manufacturing Company, in the United States courts, in the city of New York, to restrain the use of the invention described in the letters patent referred to in said agreement. The suits were brought against J. Russell & Co., Landers, Frary & Co., and Clement, Hawks & Co., respectively, by bills in equity, each of which was dated April 17, 1867. The several defendants respectively filed answers therein, setting up, among other matters, that the letters patent were invalid; that the invention was not new. In May, 1870, the defendants in said suits, respectively, filed their written consent that said bills might be taken *pro confesso*, evidence on both sides had been previously taken, and on June 9, 1870, an order was entered in each case, that the bills should be taken *pro confesso;* and no further decree, order or judgment was ever passed or entered in either of them. The records of said suits may be referred to. Upon this

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evidence, the defendant in review contended that he was entitled to recover. The judge declined so to rule.

The defendant in review then offered parol evidence to prove that the decrees in one or all three of said suits in New York, were the decree or decrees contemplated by the parties to this action, understood and intended by them to be the "decree" named in the contract upon the making or "obtaining" of which the $3000 would become payable. The defendant in review also offered to prove that before and at the time of the making the contract sued on, the said Russell declared to the said Lathrop that the decrees to be made in these three cases, or any one of them, was or were the decrees upon the making of which the requirement of the contract for a decree would be complied with, and said that the court, in which the suits were pending in New York, would sit the ensuing spring and pass upon these cases, and the said sum of money would become payable, and paid to said Lathrop; that after the making of said decrees, said Russell paid large sums of money to the complainants, Lamson & Goodnow, on account, and in payment or part payment of the damages claimed in the suit against him and his company; that on January 26, 1870, said Russell wrote to Gardner, who was a member of the Lamson & Goodnow Manufacturing Company, the following letter: "New York, Jan. 26, 1870. Mr. Jos. Gardner: Dear Sir, As our agreement for the use of your patent of 1860 makes our payment contingent upon a court decree being issued in our case, we hereby give you notice that we waive that contingency, and pay our agreed price when we confine the use of the patent to the licensed parties. If this should not be satisfactory, we will sign further papers. Truly, J. Russell & Co." That after said decrees he stated to the plaintiff and to others that the patent was valid, and could not be successfully contested; that he had used and exhausted every means of impeaching it; had fully obtained all the information bearing on the matter, and that the patent could not be resisted, and advised others to pay damages for the infringement, who did so in reliance upon his statements. That after making decrees, the said defendant in review repeatedly called on said Russell, and demanded payment, and claimed that it was due, and that said Russell, on every such occasion, acknowledged that it was due,

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and said that it ought to be paid to said Lathrop, and assigned as the only reason why he did not pay it, that Lamson & Goodnow had promised to pay the same to him, Russell, but had not done so, and he promised to see them at once and have the payment made; that he said the same to others.

That no decree or judgment adverse to the said letters patent had ever been rendered; that the reason why said suits were not further prosecuted to final judgment and decree was the reception of the letter from Russell to Gardner, and the agreement of Russell and the other defendants to pay, and the payment in part or whole of the damages said Lamson & Goodnow had suffered by the infringement complained of in said suits. That said Lathrop was not a party, nor had any knowledge of such agreements or payments, except that said Russell told him at the time of contracting with said Lathrop that he had come to the conclusion, or thought that he should come to the conclusion, that he could not successfully resist said patent, and expected he should have to pay some $12,000 or so for damages for past infringement. As to the other suits, or any settlement thereof, the said Lathrop had no knowledge or information, and he was in no way a party to, connected with or concerned in any of said suits, or the settlement thereof, except that he had given his deposition as a witness.

The plaintiff in review contended that the above evidence offered was not competent, and if any portion of it was competent for any purpose, it would not authorize the finding of a verdict for the defendant in review, and, by consent of the parties, the case was taken from the jury, and the question whether the defendant in review was entitled to a verdict upon the evidence which was introduced by him, and the questions as to the admissibility and the effect of the evidence offered by him (but not admitted) were reserved for the consideration of the Supreme Judicial Court.

If in the opinion of the court, upon the evidence introduced, and such portion of the evidence offered as the court shall deem admissible, the defendant in review would not be entitled to recover, judgment is to be entered for the plaintiff in review otherwise the case is to stand for trial.

C. Allen, for the plaintiff in review.

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A. Churchill, for the defendant in review.

GRAY, C. J. This report is not within the authority conferred upon the Superior Court by St. 1869, *c.* 438. It is not confined to a report of specific rulings of the court below, or of the question whether the whole evidence will in law warrant a verdict. But it undertakes to obtain the advice of this court in advance upon the whole course of the trial, and upon the admissibility of each and every piece of evidence offered, without any ruling of the court below upon its competency, and without even stating that evidence with sufficient precision to enable its competency to be determined. *Noble* v. *Boston*, 111 Mass. 485.

Report dismissed.

FRANKLIN PORTER *vs.* WILLIAM H. WARREN.

Norfolk. Jan. 26.— Feb. 29, 1876. ENDICOTT & DEVENS, JJ., absent.

Goods in the possession of a mortgagee were attached as the property of the mortgagor under the Gen. Sts. *c.* 123, § 67, and the mortgagee summoned as trustee. The goods were then sold by the attaching officer as perishable property under the Gen. Sts. *c.* 123, §§ 73–77, and the proceeds of the sale, after deducting the expenses thereof, were less than the amount of the mortgage, though the market value of the goods at the time of the attachment was greater than the mortgage. After the sale the attaching creditor discontinued against the trustee. *Held*, in an action of tort by the mortgagee against the attaching officer, that the Gen. Sts. *c.* 123, § 67, applied only to an attachment of goods in the possession of the mortgagor; that the attachment was void; that the attaching creditor could not by a discontinuance against the trustee turn the attachment into one under the Gen. Sts. *c.* 123, § 62; that the officer was a trespasser *ab initio*, and liable for the amount of the mortgage debt.

TORT, by a mortgagee of personal property against an attaching officer, for the conversion of the mortgaged property. Trial in the Superior Court, before *Allen*, J., who, by consent of the parties before verdict, reported the case for the consideration of his court on the question whether judgment should be entered for the plaintiff for the sum of $827.46, the amount of the mortgage debt, or for the sum of $775.25, the net proceeds of the sale of the goods by the defendant, who sold them as perishable property under the Gen. Sts. *c.* 123, §§ 73–77. The facts of the case appear in the opinion.

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W. E. Jewell, for the plaintiff.

J. F. Kilton, for the defendant.

MORTON, J. The material facts in this case are as follows: The plaintiff, being the mortgagee of certain goods, took possession of them under his mortgages for a breach of the condition thereof. The defendant, who is a deputy sheriff, on March 30, 1875, while the goods were in the possession of the plaintiff, attached and seized them upon two writs against the mortgagor, both served upon the same day. One was a writ in favor of Thomas S. Nowell, in which the plaintiff was summoned as trustee, and the other a common writ of attachment in favor of John Bath. On the same day the plaintiff duly made a demand in writing upon said Bath for the amount due under his mortgages, in pursuance of the Gen. Sts. *c.* 123, §§ 62, 63, but no payment or offer of payment of the amount due under the mortgages was ever made by Bath. On June 25, 1872, the defendant, upon the application of Nowell, both parties not consenting, sold the goods pursuant to the provisions of the Gen. Sts. *c.* 123, §§ 73–77, the proceeds of the sale, after deducting expenses, amounting to a sum less than the sum due on the plaintiff's mortgages. Both of said writs were entered in the Superior Court, judgments were obtained against the mortgagor, and the executions issuing thereon were levied upon the proceeds of said sale in the hands of the officer. In the suit of Nowell, in which this plaintiff was summoned as trustee, the said Nowell, on October 1, 1872, before he took judgment, discontinued against the trustee.

Upon these facts, it is clear that the attachment made in the suit of Bath was dissolved by the failure of the attaching creditor to pay or tender the amount for which the property was liable, to the mortgagee, within ten days after it was demanded. Gen. Sts. *c.* 123, §§ 62, 63. This attachment, therefore, cannot avail the defendant as a justification of his acts, but he must rely solely upon the legality of the attachment made in the suit of Nowell.

The statutes provide three modes in which a creditor may attach the personal property of his debtor which is subject to a mortgage.

If the property is in the possession of the mortgagee, he may sue out a trustee process in the common form, in which the mort-

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gagee is summoned as trustee of the mortgagor, and, upon paying the amount due the trustee, the latter is required to deliver the property to the officer who holds the execution. Gen. Sts. *c.* 142, §§ 55–59. *Hooton* v. *Gamage*, 11 Allen, 354.

A second mode is provided by the Gen. Sts. *c.* 123, § 62, by which the creditor may attach the personal property of his debtor which is subject to a mortgage, whether it be in the possession of the mortgagor or mortgagee, in the same manner as if it were unincumbered, provided he pays or tenders to the mortgagee the amount for which the property is liable within ten days after the same is demanded.

Section 67 of the same chapter provides, as the third method, that, if the property is in the possession of the mortgagor, it may be attached in the same manner as if it was unincumbered, and the mortgagee may be summoned in the same action in which the property is attached as the trustee of the mortgagor, to answer any questions which may be put to him by the court in their order touching the consideration of the mortgage and the amount due thereon.

It is clear that in this case the creditor attempted to avail himself of the third mode above stated. He made an attachment by an actual seizure of the property, and in the same suit summoned the mortgagee as trustee of the mortgagor. This remedy is not open to him unless he brings himself within the provisions of § 67, above cited. But this section applies only to cases where the property is in the possession of the mortgagor, and in this case it is shown that the property, at and before the time of he attempted attachment, was in the possession of the mortgagee. It follows that the attachment in the suit of Nowell was illegal. The plaintiff in that suit mistook his remedy. He attempted to make an attachment in a manner not authorized by law. The officer was a trespasser *ab initio*, and the mortgagee, whose rights were invaded, could at any time after the seizure of the property maintain an action of tort for its conversion, or of replevin for its recovery. *Boynton* v. *Warren*, 99 Mass. 172.

But the defendant contends that having discontinued against the alleged trustee, because upon his examination it was disclosed that he was a mortgagee in possession, he has the right to treat the attachment as made under § 62, cited above. The an-

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swer is that he did not make his attachment in the manner provided in that section, which gives no authority to summon the mortgagee as trustee. The mortgagee had a right to assume that the remedy adopted by the attaching creditor was, as it purported to be, the remedy provided by § 67. The rights and duties of the mortgagee are vitally affected by the form of the remedy which the creditor elects to adopt. If he proceeds by a seizure of the property under § 62, it is the right and duty of the mortgagee to state in writing a true account of the debt due him under his mortgage, and, if the creditor does not pay this amount within ten days after it is demanded, the attachment is dissolved. But, if the creditor adopts the method provided in § 67, by attaching the property and summoning the mortgagee as trustee in the same suit, the latter is not required to state an account and make a demand upon the creditor, and he cannot by such demand require the creditor to pay the debt; but the validity of his mortgage and the amount due thereon is to be adjudicated by the court, or tried by a jury at the election of the creditor. *Martin* v. *Bayley*, 1 Allen, 381. In this case the creditor elected to pursue the remedy by attaching the property and summoning the mortgagee as trustee. He cannot afterwards, by discharging the trustee, convert it into another remedy, to which different incidents and consequences attach.

The necessary result of these considerations is that the plaintiff is entitled to recover the value of the goods converted, to the extent of his interest as mortgagee. As the attachment was illegal in the beginning, the officer had no right, as against the plaintiff, to sell the goods, and the fact that the proceeds of the sale were less than the sum due to the plaintiff is immaterial.

It is unnecessary to consider whether, as urged by the defendant, relying upon the *dictum* in the closing sentence of the opinion in *Jackson* v. *Colcord*, 114 Mass. 60, 62, if the attachment had been legal, the officer could sell the property without notice to the mortgagee. The attachment being illegal and void *ab initio*, he had no right to sell the goods either with or without notice to the plaintiff.

It follows that the plaintiff is entitled to judgment for the larger sum found by the auditor.

Judgment for the plaintiff accordingly.

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EPHRAIM F. BELCHER *vs.* W. A. H. LOVELAND.

Norfolk. Jan. 26. — Feb. 29, 1876. ENDICOTT & DEVENS, JJ., absent.

The plaintiff bought certain stock of the defendant at a price named. The plaintiff and defendant entered into an agreement in writing, by which, in consideration of the purchase, the defendant agreed to pay to the plaintiff, at the expiration of three years from the date of the agreement, all loss he might sustain in consequence of the purchase, including ten per cent. interest on the price paid, and the plaintiff agreed to pay to a third person one fourth of all profits he might receive from dividend or sale of the stock, deducting ten per cent. interest on the cost of the stock. *Held*, that there could be no breach of the agreement until the expiration of the three years; that the defendant was liable to the plaintiff at the end of the three years for loss sustained by him in consequence of depreciation in the value of the stock up to that time; and that the plaintiff was not required to sell the stock to determine its value, which could be proved by other modes.

CONTRACT upon the following agreement under seal, signed by the plaintiff and the defendant and W. B. Wentworth, and dated March 20, 1868:

"Know all men by these presents, that Ephraim F. Belcher, of Randolph, has this day purchased from W. A. H. Loveland, of Golden City, C. T., forty shares of the stock of the Golden City Mineral and Land Co., upon the following terms and conditions, to wit: The said E. F. Belcher has paid the said Loveland ten hundred and forty dollars, at the rate of 26 dollars per share for said forty shares. Now, in consideration of the said E. F. Belcher having made such a purchase, the said Loveland and W. B. Wentworth, of Randolph, do hereby agree that they will severally or jointly pay to E. F. Belcher, at the expiration of three years from date, all loss he may sustain in consequence of purchase of said stock, including 10 per cent. per annum interest on 1040 dollars paid by him for said stock; and further, the said E. F. Belcher, in consideration of the premises, agrees to pay to W. B. Wentworth one fourth of all profits he may receive from dividend or sale of said stock, after deducting 10 per cent. per annum interest on cost (26 dollars per share) of said stock."

At the trial in this court, before *Ames*, J., the plaintiff offered evidence, which was not controverted, tending to show that the forty shares of stock in the Golden City Mineral and Land Company, purchased by him of said Loveland, under said agreement, had never paid any dividend, and had within and during the

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three years therein mentioned very greatly depreciated in value, and much below the price paid by him therefor; and that the said stock, after the expiration of the three years, became and was and is now wholly worthless, and that he thereby lost the whole sum by him paid therefor; and he thereupon claimed to recover the whole amount paid by him for the stock, and interest thereon, as provided in said agreement; and that if he was not so entitled, yet he was in any event entitled to recover the whole depreciation of the value of said stock during or at the expiration of said three years, and interest thereon. The defendant, Loveland, when said agreement was made, and ever since, had resided in Golden City, Colorado Territory. At the first time, when he came to this Commonwealth, but after said three years, and the day before the writ in this action was served, the plaintiff demanded of him payment of his loss under said agreement, and offered to return to him the stock. The writ was dated February 24, 1874. The plaintiff did not sell, but still holds the shares of stock, although the same are now of no value.

The defendant contended, upon the foregoing evidence, that the plaintiff could not recover anything, because he had not sold the said shares during or at the expiration of the three years mentioned in said agreement, and requested the judge so to rule.

The case was reported for the consideration of the whole court upon the foregoing facts. If the plaintiff was entitled to recover for the whole or any part of the depreciation of said stock, or anything, in the case, judgment was to be rendered in his favor, and the case sent to an assessor to determine the damages; otherwise, judgment to be rendered for the defendant.

C. T. Russell, for the plaintiff.

H. C. Hutchins, for the defendant.

AMES, J. By the terms of the agreement, the defendant undertook to indemnify the plaintiff, at the end of three years, against any loss which he might sustain in consequence of his purchase of the stock. There could be no breach of the agreement on the defendant's part until the expiration of the three years; and nothing then became payable from him, except the loss up to that time. His guaranty did not extend to any later period. A sale of the stock at the end of the three years, supposing it to be fairly conducted, might have furnished a conven-

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ient measure of its value at that time, but there is nothing in the contract requiring such a sale, and the value of the stock is susceptible of proof in other modes. If, since the expiration of the agreed time, the stock has risen in value, the defendant may perhaps be entitled to the benefit of such rise. Good faith would require of the plaintiff, so long as the stock remained in his hands, to get the best price he could for it, and so reduce the ultimate loss to the lowest amount practicable. But if there has been no such rise, and it appearing from the report that the stock is now worthless, the measure of the plaintiff's damages would be the difference between the price paid, with interest for three years at ten per cent. per year, and the market value of the stock in March, 1871, with interest on such difference.

Judgment for the plaintiff; damages to be assessed.

LEWIS FELLOWS & another, executors, *vs.* MILES MINER & others.

Berkshire. Sept. 15, 1875. — March 1, 1876. AMES, DEVENS & LORD, JJ., absent.

A bequest to a town in trust, directing the town to appoint some suitable person or persons to receive and invest the fund, and annually at the annual town meeting to appoint some suitable person or persons to collect the income of the fund, and annually, at such time as the town shall direct, to pay over the same to such of the aged and infirm native-born inhabitants of the town, and maiden ladies who are native-born inhabitants of the town, although they be not aged, as shall be deemed by him or them most needy, and to each one such a sum as he or they shall think most just and equitable, and providing that no part of the said income shall be paid to any person who is receiving support as a pauper, is a valid charitable bequest under the laws of this Commonwealth.

A charitable bequest in trust by a resident of this Commonwealth to a town in another state is not void because the town, at the time the bequest is made, is incapable, under the laws of that state, of taking the trust; and the fund may be ordered to be paid over to the town upon its being enabled, by a subsequent act of the Legislature of the other state, to administer the trust according to the will.

A testator living in this Commonwealth, and having property here, devised it to a town in New York in trust for charitable uses, directing the town annually to appoint at its annual town meeting some person or persons to administer the trust. The town being then incapable under the laws of New York of taking the trust,

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an act was passed by the Legislature of that state empowering the town to receive and hold the property in trust, and authorizing the supervisor and justices of the peace of the town to appoint one or more suitable persons to receive the property and administer the trust. *Held*, that such administration by persons appointed in the manner provided by the act would not be according to the will of the testator; but that, if the Legislature of New York should, within a reasonable time, provide by supplemental statute for the administration of the trust according to the will, the fund might be ordered to be paid to the town.

BILL IN EQUITY, by the executors of the will and codicil of Edward G. Miner, against Miles Miner and Harriet, his wife, beneficiaries under the will and the parents of the testator, and against the inhabitants of the town of Kinderhook, in the State of New York, the devisees in trust under the will, to obtain the instructions of the court. The case was reserved by *Colt*, J., for the consideration of the full court, and was as follows:

The testator, a resident of Great Barrington, in this Commonwealth, made his will on January 6, 1872, which, after certain specific bequests, proceeded as follows:

"Seventh. All the residue of my estate, both real and personal, which I may own at my decease after the payment of my just debts, funeral expenses, and the expenses of settling my estate by my executors hereinafter named, I give and bequeath to the town of Kinderhook, New York, in its corporate capacity, in trust for the uses and purposes following: I direct said town to appoint some suitable person or persons to demand and receive the same from my said executors, and to invest the same as he or they shall deem best. I further direct that said town of Kinderhook shall annually, at their annual town meeting, appoint some person or persons to collect the interest and income thereof annually, and appropriate the same as follows: First, I direct that he or they shall pay annually, on the first day of May, to each of my parents, Miles Miner and Harriet Miner, his wife, the sum of one hundred dollars so long as they both shall live. At the death of either one of them, I direct that he or they shall pay to the survivor the sum of one hundred and fifty dollars annually during his or her life, at the time above stated. Second, I direct that he or they shall annually, at their discretion, expend the sum of four hundred dollars for the purpose of keeping the cemetery in said town, where the remains of my beloved wife and her parents are buried, in good order, and in keeping and preserving the monu-

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ments erected at their respective graves in a suitable and proper condition, and in keeping and maintaining the fence inclosing said cemetery in good order. The remainder of said interest and income shall be annually, at such time as said town shall direct, paid over to such of the aged and infirm native-born inhabitants of said town, and maiden ladies who are native-born inhabitants of said town, although they be not aged, as shall be deemed by him or them most needy, and to each one such a sum as he or they shall think most just and equitable, provided always that no part of said interest or income shall be paid to any person who is receiving support as a pauper."

The testator afterward made a codicil to his will, altering the sum to be expended upon the cemetery and the annuities to his parents, but not otherwise affecting the above provisions.

The testator died on June 13, 1872, and on July 15, 1873, the will and codicil were duly admitted to probate. The testator was a widower, and died without issue, his father, the defendant Miner, surviving him. He left real estate in Great Barrington, and personal estate; and after the payment of his debts, the expenses of settling the estate, and the other legacies, there was a considerable sum to be disposed of under the seventh clause of the will.

On April 29, 1875, the following statute was passed by the Legislature of New York:

"An Act to authorize the town of Kinderhook to take a legacy under the will of Edward G. Miner, deceased.

"SECTION 1. The town of Kinderhook, Columbia County, is hereby authorized and empowered, in its corporate capacity, to receive and hold in trust all the residuary estate and legacy, and all sums of money growing out of same, bequeathed by the will of Edward G. Miner, deceased, bearing date January six, eighteen hundred and seventy-two, and by any codicil thereof, for the uses and purposes mentioned in said will and codicil.

"SECTION 2. The supervisor and justices of the peace of said town are hereby authorized and empowered to appoint suitable persons, one or more, to receive such legacy from the executors of said will, and to collect the interest and income upon said legacy, and appropriate the same according to the terms and provisions of said will and codicil.

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"SECTION 3. The persons so appointed as provided in section two shall, before receiving any portion of said legacy, give a bond, with one or more sureties as security for the same, which said bond shall be approved as to its form and sufficiency by the supervisor of said town, and shall be filed in the town clerk's office."

The statute laws of the State of New York relating to trusts and to charitable uses, or to other matters bearing upon the questions at issue, found in the printed copies of the statute laws of that state, purporting to be published under its authority or certified by the proper officers, were by consent of parties referred to as facts and as part of this case, and the books of reports of cases adjudged in the courts of New York, as evidence of the unwritten or common law of that state.

C. L. Beale, (of New York,) for the town of Kinderhook.

M. Wilcox, (*J. Dewey, Jr.*, with him,) for the defendant Miner.

GRAY, C. J. This charitable bequest would apparently be held ineffectual and void by the courts of New York, if the testator had been domiciled and his estate had been settled there; not, however, because the purpose was unlawful, but because, by the later decisions of the Court of Appeals, the statutes of that state are held to have repealed the old law of charitable uses, and to have prohibited any corporation to take a charitable bequest of this description without express authority of the Legislature. *Sherwood* v. *American Bible Society*, 4 Abbott, (N. Y.) 227; *S. C.* 1 Keyes, 561. *Bascom* v. *Albertson*, 34 N. Y. 584. *Adams* v. *Perry*, 43 N. Y. 487. *Holmes* v. *Mead*, 52 N. Y. 332.

But the testator's domicil being in this Commonwealth, the question of the validity of his dispositions of his personal property, though to be executed elsewhere, is to be determined by the law of Massachusetts. *Fay* v. *Haven*, 3 Met. 109. *Phelps* v. *Pond*, 23 N. Y. 69. *Bascom* v. *Albertson*, 34 N. Y. 584. *Chamberlain* v. *Chamberlain*, 43 N. Y. 424. By our law, this bequest is valid, whether the beneficiaries are in this or in any other state or country. *Bartlet* v. *King*, 12 Mass. 536. *Washburn* v. *Sewall*, 9 Met. 280. *Webb* v. *Neal*, 5 Allen, 575. *Odell* v. *Odell*, 10 Allen, 1. *Saltonstall* v. *Sanders*, 11 Allen, 446. And the fact that a charitable bequest, otherwise valid, cannot take effect immediately, for want of proper objects or trustees, or of enabling

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acts of the Legislature or of the Executive, will not defeat it. *Sanderson* v. *White*, 18 Pick. 328, 336. *Odell* v. *Odell*, 10 Allen, 1, 8. *Baker* v. *Clarke Institution*, 110 Mass. 88, 91.

The court will not allow a valid charitable trust to fail for want of a trustee; and if the trust is to be executed out of the Commonwealth, the court may appoint a trustee here to receive the bequest, or may order the fund, or the income thereof from time to time, to be paid to a trustee in the place where the trust is to be executed — as may be consistent with its own jurisdiction and practice, and best carry out the intention of the testator. *Washburn* v. *Sewall*, 9 Met. 280. *Attorney General* v. *London*, 3 Bro. Ch. 171; *S. C.* 1 Ves. Jr. 243. *Mayor of Lyons* v. *East India Co.* 1 Moore P. C. 175, 295–297, and cases cited. *Attorney General* v. *Sturge*, 19 Beav. 597. *Chamberlain* v. *Chamberlain*, 43 N. Y. 424.

This bequest is "to the town of Kinderhook, New York, in its corporate capacity," in trust for the charitable uses and purposes declared in the will. The St. of New York of 1875, *c.* 200, § 1, expressly authorizes that town in its corporate capacity to receive and hold in trust all the property bequeathed to it by this will, for the uses and purposes therein mentioned. The bequest being valid by the law of this state, the town named in the will as trustee being now enabled, by a special act of the Legislature of the state in which it is situated, to take the bequest, and the trust being directed by the will to be executed in that state and for the benefit of the inhabitants of that town, the court might properly direct the fund to be paid over to the town, if it were clear that the trust could thereupon be lawfully administered according to the will of the testator.

But here a new difficulty arises. The testator directs that the interest and income of the fund shall be collected and distributed by persons appointed by the town annually for that purpose. The statute of New York, already referred to, § 2, authorizes such persons to be appointed by the supervisor and justices of the peace of the town. The collection and distribution of the income by persons appointed by certain municipal officers would not be according to the will of the testator, which directs those persons to be appointed by the town itself. It does not therefore as yet appear that, if the fund should be ordered to be paid

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to the town of Kinderhook, it could be administered according to the will of the testator. The court is not at liberty to alter the scheme of the testator, either as to the objects of the charity or the agents by whom it is to be administered, unless it appears to be impossible to carry out his scheme according to its terms. *Baker* v. *Smith*, 13 Met. 34, 41. *Trustees of Smith Charities* v. *Northampton*, 10 Allen, 498, 501, 502. *Harvard College* v. *Society for Theological Education*, 3 Gray, 280. *Jackson* v. *Phillips*, 14 Allen, 539, 591, 592.

The result is, that the bequest must be adjudged valid, and the cause must stand for further directions. If the Legislature of New York shall see fit to provide by supplemental statute for the administration of the trust according to the will, the fund may then be ordered to be paid to the town of Kinderhook. If there shall be no such legislation within a reasonable time, it will become necessary to consider whether the court should appoint an other trustee, or whether the bequest must fail.

Decree accordingly.

The Legislature of New York, by the St. of 1876, *c*, 241, passed May 13, 1876, provided for the election by the town of Kinderhook of persons to administer the trust according to the will; and by the final decree in the cause, at September term 1876, the fund, after payment of the defendants' costs, taxed as between solicitor and client, was ordered to be paid to the town.

HULDAH M. PECK *vs.* JAMES E. CONWAY & another.

Berkshire. Sept. 15, 1875. — March 9, 1876. AMES, DEVENS & LORD, JJ., absent.

A reservation in a deed of land, that no building is to be erected by the grantee, his heirs or assigns, upon the land conveyed, creates an easement, or a servitude in the nature of an easement, upon the land; and the situation of the land relatively to other land of the grantor may be considered in determining whether such easement or servitude is a personal right of the grantor or is appurtenant to his other land.

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Parties deriving title under a recorded deed have constructive notice of its provisions; and it is immaterial that they have no actual knowledge thereof.

A., the owner of a large lot of land, conveyed a portion of it to B., with the reservation in the deed "that no building is to be erected by the said B., his heirs or assigns, upon the land herein conveyed." A. retained the rest of the lot as his homestead, and owned no other land in the vicinity; and afterwards sold the homestead lot to C. by a deed describing the land by metes and bounds, but making no mention of the reservation in the deed to B., or of privileges and appurtenances. B. afterwards sold to D. by a deed making no reference to the reservation, and D. had no knowledge thereof. All the deeds were duly recorded. *Held*, that it was to be inferred that A. and B. intended to create an easement on the granted land for the benefit of A.'s adjoining estate; that this easement passed as appurtenant to the land by the conveyance to C.; and that he could maintain a bill in equity to prevent D. from building on his land, although a proposed building would do no appreciable injury to C.'s land.

BILL IN EQUITY, by the owner of lot A. shown on the plan printed in the margin,* to restrain the defendants, the owners of lots B and C, from building on lot B.

The case was reserved by *Colt*, J., upon the pleadings and the report of a master, for the consideration of the full court, and was as follows:

Richard Ensign, on February 14, 1848, being the owner of lots A and B, and occupying lot A as a homestead, conveyed lot B, in fee simple, with general covenants of warranty, to Joseph B. Huggins, who was then the owner of lot C. The deed described the land by metes and bounds, and following the description was this clause: "with this express reservation, that no building is to be erected by the said Joseph B., his heirs or assigns, upon the land herein conveyed."

The defendants purchased lots B and C in 1874. Of the deeds in the chain of title from Huggins, which were all duly

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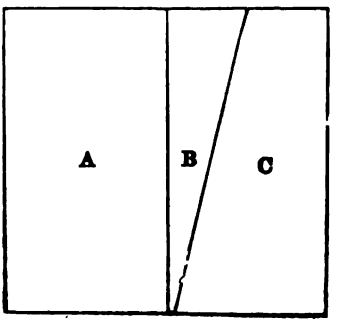

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recorded before the defendants purchased, some mentioned or referred to the reservation in Ensign's deed, but the deed to the defendants, which contained full covenants of warranty, made no mention of it or reference to former deeds. The defendants made no examination of the records before their purchase, and had no actual knowledge of the reservation.

The plaintiff purchased lot A of Richard Ensign by deed dated April 13, and recorded April 14, 1848. This deed made no mention of privileges or appurtenances, or of the reservation in the deed to Huggins. The defendants purchased their land, paying therefor its full market value, free of incumbrances, for the purpose of building thereon. The plaintiff notified them of the restriction before they commenced building, and forbade them so to do, and, upon their proceeding to build upon the land, brought this bill.

The master found that the greater part of the proposed building would stand upon lot B; that it would not obstruct the view from the front rooms in the plaintiff's house, and only partially obstruct the view from the rooms in the rear part of the house; and that its erection would be no appreciable damage or injury to the plaintiff's premises.

A. J. Waterman, for the plaintiff.

J. Dewey, Jr., for the defendants.

MORTON, J. Both parties derive title from Richard Ensign. The deed of said Ensign, under which, through various mesne conveyances, the defendants derive their title, conveys to Joseph B. Huggins a triangular piece of land adjoining the lot now owned by the plaintiff, "with this express reservation, that no building is to be erected by the said Joseph B., his heirs or assigns, upon the land herein conveyed." Ensign, being owner of the fee, had the right to sell his land subject to such reservations or restrictions as to its future use and enjoyment as he saw fit to impose, provided they were not contrary to public policy. The restriction in this deed, that no building should be erected upon the land conveyed, was one which he had a right to make, and there is no room for doubt, that, if a building was erected in violation of this restriction, Ensign, as long as he lived and remained the owner of the adjoining land, would be entitled to relief in equity to enforce the restriction. *Parker* v. *Nightin-*

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gale, 6 Allen, 341. *Whitney* v. *Union Railway*, 11 Gray, 359. *Badger* v. *Boardman*, 16 Gray, 559.

The only question in the case is whether the plaintiff, who is the grantee of said Ensign, is entitled to the same remedy.

The reservation creates an easement, or servitude in the nature of an easement, upon the land conveyed. If this easement was created for the benefit of the adjoining lot, of which the grantor in the deed remained the owner, and not for the personal convenience of the grantor, and was intended to be annexed to such lot, it would be appurtenant thereto, and would pass to a grantee thereof.

The question whether such an easement is a personal right, or is to be construed to be appurtenant to some other estate, must be determined by the fair interpretation of the grant or reservation creating the easement, aided, if necessary, by the situation of the property and the surrounding circumstances.

In this case, the triangular piece of land affected by the easement was a part of a large lot owned by Ensign. He retained the remainder of the large lot for his homestead. There is no suggestion that he had other land in the vicinity, which could be benefited by the restriction. It is difficult to see how he would have any interest in restricting the use of the land sold, except as owner of the house lot which he retained. The nature of the restriction also implies that it was intended for the benefit of this lot. A prohibition against building on the land sold would be obviously useful and beneficial to this lot, giving it the benefit of better light and air and prospect; this is its apparent purpose, while it would be of no appreciable advantage for any other purpose. The fair inference is that the parties intended to create this easement or servitude for the benefit of the adjoining estate. We are therefore of opinion that it was not a mere personal right in Ensign, but was an easement appurtenant to the estate which he conveyed to the plaintiff. *Dennis* v. *Wilson*, 107 Mass. 591. *Stearns* v. *Mullen*, 4 Gray, 151. It follows that the plaintiff is entitled to the relief which she seeks.

The fact that the defendants, when they took their deed, had not actual knowledge of this reservation is immaterial. They derive their title under the deed which contains it, and have constructive notice of the provisions of the deed. *Whitney* v. *Union*

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Railway, ubi supra. Nor can the fact found by the master, that the erection of the building contemplated by the defendants "would be no appreciable damage or injury to the plaintiff's premises," affect the rights of the parties. Such an act of the defendants would be against the restriction by which they are bound, and a violation of the rights of the plaintiff, of which she cannot be deprived, because in the judgment of others it is of little or no damage. *Decree for the plaintiff.*

JUSTIN L. WORTHY, guardian, *vs.* COLLINS B. WARNER & others.

Berkshire. Sept. 14, 1875. — March 27, 1876. AMES, DEVENS & LORD, JJ., absent.

On a bill in equity, filed January 8, 1874, to redeem a mortgage, it appeared that on a writ of entry to foreclose the mortgage, an execution for possession issued dated May 6, 1869, upon a conditional judgment; that the officer's return and the acknowledgment of possession were dated May 3, 1869; and that the execution was recorded June 10, 1869. *Held*, that the date of the officer's return was not conclusive as to the actual date of the possession; and it appearing from the whole record, without resort to other evidence, that possession was actually taken on some day after the execution was issued and before June 10, that this was enough to commence the foreclosure as of the latter date.

The assignee of a judgment and execution for the foreclosure of a mortgage, under which possession had been taken, advanced to one of the owners of the equity, who was the guardian of the other owners, who were minors, a further sum, taking his note with sureties for the amount of the mortgage debt and the additional sum, and giving him a written agreement to cancel and assign to him the judgment, if he should pay the note with interest at its maturity, but not otherwise. The note was paid before its maturity by the sureties, and the judgment was assigned to them after the lapse of three years from the time possession was taken. *Held*, on a bill in equity to redeem, that there had been no payment of the mortgage debt or waiver of the foreclosure.

BILL IN EQUITY, filed January 8, 1874, by Justin L. Worthy, guardian of Susan A. Luce and Frederick W. Luce, against Collins B. Warner, Sidney A. Luce, personally and as administrator of Pluma A. Luce, Edwin L. Humphrey, Daniel Sprague, Phineas L. Sprague and the Berkshire Life Insurance Company, to redeem a parcel of land in Pittsfield from a mortgage executed on January 9, 1867, by Pluma Ann Luce, the mother of

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the plaintiff's wards, in which her husband, Sidney A. Luce, joined, to secure the payment of a note for $630 and interest to the defendant Sprague. Hearing before *Colt*, J., who reported the case, for the consideration of the full court, in substance as follows:

On June 10, 1867, Sprague brought his writ, in the Superior Court, to foreclose the mortgage. Pluma Ann Luce died intestate August 23, 1867, pending said suit, and leaving the wards her only heirs at law, and leaving no property other than the equity of redemption in said mortgage. On October 14, 1868, Sidney A. Luce was appointed administrator of the estate of Pluma Ann Luce, and guardian of the two minor children; and at February term 1869 of the Superior Court, after notice to the minors and their appearance by their guardian, conditional judgment was rendered in favor of Sprague, against Sidney A. Luce and the minor heirs, for $711.58, and $24.99 costs of suit.

On May 6, 1869, an execution of *habere facias* issued upon said judgment, and seisin and possession thereon was delivered to E. M. Wood, attorney for Sprague, June 3, 1869. The return on the execution, and the acknowledgment of the delivery of seisin and possession on the back of said execution, were both dated May 3, 1869. The execution and the proceedings thereon were recorded in the registry of deeds June 10, 1869, as appeared by the certificate of the register of deeds.

The defendants contended that the date of the officer's return, and of Mr. Wood's receipt, was a manifest error, and should have been June 3 instead of May 3. The plaintiff objected to the introduction of any evidence to vary, contradict or control the record, and contended that the defendants could not in any way be allowed to show that possession was not had on May 3, 1869, and that all the legal and equitable rights of the parties must be decided and governed by the dates as recorded.

On June 7, 1869, Sidney A. Luce, desiring to pay Sprague and to obtain an additional loan of money, gave his negotiable promissory note to the Berkshire Life Insurance Company for one thousand dollars payable in three years from its date, with interest, with the defendants Page and Humphrey as sureties. The insurance company then took an assignment of the judg

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ment from Sprague; and gave Luce a written instrument reciting the assignment to them of the judgment, the further loan to Luce, and the note, and concluding as follows: "Now then if said Luce shall well and truly pay said note and interest at the time specified, the said Berkshire Life Insurance Company promise and agree to cancel and assign said judgment to the said Luce, but not otherwise."

At the same time, and as part of the same transaction, Luce executed to his sureties, on the same paper with the last named agreement, and of the same date, the following written instrument, under seal:

"In consideration of the above named E. L. Humphrey and P. L. Page signing the above described note as my sureties, in case the said Humphrey and Page pay the said note, I hereby give, grant and assign to them all my right, title and interest in said judgment above described, and I do in case of such payment hereby authorize and request said Berkshire Life Insurance Company to relinquish and transfer all their right, title and interest in and to said judgment unto them, the said Humphrey and Page, their heirs and assigns forever."

On May 25, 1872, before its maturity, the note of Luce to the life insurance company was paid by the sureties, who obtained a bank discount of a note with Page as maker and Humphrey as indorser for sixty days, for $1200, and which was paid by a note of the defendant Warner, indorsed by Page and Humphrey, and paid September 28, 1872.

The life insurance company, after the lapse of three years from the time possession was taken for foreclosure, executed to the sureties at their request an assignment of said judgment, which was in very guarded form, and referred to the execution and the assignment of Sprague to said company, for description of the lands only. This assignment the defendants at the hearing proved was lost. It was never of record, but was in existence and in the possession of Page and Humphrey on July 27, 1872, and was then examined by the defendant Warner.

On June 24, 1872, the life insurance company executed and delivered to Page and Humphrey a quitclaim deed of that date, of all its right, title and interest in the land described in the execution.

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On July 16, 1872, the resignation of Sidney A. Luce as guardian of the minors was duly accepted in the probate court, and on the same day L. H. Gamwell was appointed and qualified as their guardian.

On July 27, 1872, Page and Humphrey, with the knowledge, consent and coöperation of Gamwell, then guardian of the minors, but without any authority or license from the probate court, and claiming to be sole owners of the land described in the Sprague mortgage, sold to the defendant Warner, who had been one of the bondsmen of Sidney A. Luce as guardian and as administrator, and who had full knowledge and notice, both constructive and actual, at the time of the sale, of the title of the premises, the premises described in said Sprague mortgage, at a public auction, after public notice thereof by handbills and by publication, for the sum of $1700. The actual cash value of the property was a few hundred dollars in excess of this price. Their deed to Warner, which was of quitclaim, was of the same date. On September 26, 1872, Sprague conveyed to Warner all his right, title and interest in the premises for a nominal consideration. Gamwell resigned his guardianship on December 2, 1873, and the plaintiff was appointed guardian in his stead. Before bringing the bill, the plaintiff demanded of the defendants an account of the rents and profits and of the amount due on the mortgage; which they did not render, alleging that the mortgage was foreclosed and that the plaintiff had no right to redeem.

If the plaintiff was entitled to redeem, such decree was to be made as would enable him to do so; otherwise the bill to be dismissed with costs.

T. P. Pingree & J. M. Barker, for the plaintiff.

A. J. Waterman, (*E. M. Wood* with him,) for the defendant Warner.

COLT, J. The defendant Warner denies that the plaintiff has now the right to redeem the premises in dispute, and contends that the mortgage from Mrs. Luce to Sprague, by which he derives title, has been legally foreclosed.

In a suit upon this mortgage, conditional judgment was recovered by Sprague, and an execution for possession was issued dated May 6, 1869. The officer's return of the delivery of seisin

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and possession, and the acknowledgment thereof by the attorney of Sprague upon the back of the execution, are both dated May 3, instead of June 3, 1869, which without doubt was the true date. The execution and the officer's return with the attorney's acknowledgment was, however, left for record in the registry of deeds, June 10, 1869, within the time required by law, as appears from the register's certificate upon it.

It is contended by the plaintiff that the return must be taken as it stands, without amendment; and that Sprague's possession, therefore, does not appear to have been obtained in a way which is effectual under the statute to foreclose the mortgage, and cannot so operate, however long continued. The statute provides that possession recovered by a real action in which conditional judgment is rendered, and continued peaceably for three years, shall foreclose forever the right of redemption. Gen. Sts. *c.* 140, § 1. It is apparent from the date of the execution, and the time of its registration, that the date of the return is an error. The papers as they stand indicate that June 3 was the date intended; but whether so or not, it is certain from the whole record alone, without resort to other evidence, that possession was actually taken by Sprague's attorney under and by virtue of the judgment and execution, on some day after the process was issued, and before June 10, 1869, when it was left for registration. This was enough to commence the foreclosure, and, counting only from the latter date, there is time for three years' possession by the mortgagee, or those claiming under him, before this bill to redeem was filed.

The plaintiff further contends, that, before the defendant Warner acquired title, the mortgage had been paid by Sidney A. Luce, after he became owner of a legal interest in the equity of redemption; or, at least, that there had been a waiver and abandonment of the foreclosure by the holder of the mortgage.

It appears that Sprague's conditional judgment was recovered against Luce as tenant by the curtesy, and also against the two minor heirs of Mrs. Luce, who were all made parties after her death. The point relied on depends upon the effect to be given to the transaction between Sprague, Luce and his sureties, and the insurance company, after judgment had been recovered for foreclosure. The case shows that Luce, desiring to pay Sprague

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and obtain a small loan in addition, gave to the company a note dated June 7, 1869, with sureties, payable in three years, for the whole amount, and the company at the same time took an assignment from Sprague, under seal, of his judgment, with all the lands that might be recovered thereon, and agreed, under seal, to assign the same to Luce on payment of the note. The latter agreement recited that the company had satisfied Sprague for the assignment, and had lent Luce a further sum sufficient to make up the amount of the note. At the same time, and as part of the same transaction, Luce gave to his sureties on the note a conveyance under seal of all his interest in the judgment, requesting the company to transfer the same to them in case they-the sureties, should pay the note. The note was, in fact, paid by the sureties shortly before its maturity; and, after the time for foreclosure had expired, the judgment was assigned and the lands described in the execution quitclaimed by the company to the sureties. The sureties, claiming to be absolute owners, shortly after sold and conveyed the premises to the defendant Warner, who had full knowledge at the time of the facts above stated relating to the title. Sprague also about the same time quitclaimed all title in the land to the defendant Warner.

In view of the legal and equitable rights of all parties under the several deeds and assignments, it is plain that the payment of the note by the sureties cannot be construed as a payment of the Sprague mortgage, or as manifesting an intention to waive or abandon its foreclosure; on the contrary the purpose and effect of all the proceedings was to transfer to the insurance company in the first instance, and then to the sureties, the security of the mortgage with the benefit of the judgment for foreclosure and the possession had under it. The amount due was paid Sprague by the insurance company and the judgment assigned by him to them directly; they became, if not the legal, at least the equitable, owners of the mortgage. This title passed to the sureties, was conveyed to Warner, and was confirmed by Sprague's deed conveying whatever legal title may have remained in him.

The mortgage thus held by the insurance company did not lose its character because Luce had given his note with sureties to secure the amount paid Sprague. If Luce had himself paid

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that amount, in accordance with his purpose and intention, and the judgment had been transferred to him, the case would have been different, upon the question whether it should be treated as a discharge of the mortgage. It was not paid by him, but by his sureties, to whom it was agreed, both by him and the company, that the security should be transferred to be held by them and applied as indemnity against their liability. They held it after foreclosure by an absolute title, liable to account only for its faithful application. There is no claim that it was not fairly and honestly sold and the proceeds applied by the sureties. No charge of fraud on the part of the defendant is open upon this report. *Bill dismissed, with costs.*

JOTHAM G. CHASE *vs.* BOARD OF ALDERMEN OF SPRINGFIELD.

Hampden. Sept. 29, 1875. — March 1, 1876. AMES, DEVENS & LORD, JJ., absent.

On a petition for a writ of certiorari to bring up and quash the proceedings of an inferior tribunal, an answer of the tribunal containing allegations and denials of fact, and signed by counsel, is irregular.

It is no ground for a writ of certiorari to quash the proceedings of a tribunal, authorized to assess betterments for the laying out of a highway, that the records of the tribunal do not show that a grade line was established.

The erection of railings or barriers, required for the safety of public travel, is not essential to the completion of a public way under the St. of 1871, c. 382, § 1; and the want thereof does not prevent the assessment of betterments under that section.

The record of the board of city or town officers of their proceedings in the laying out or altering of a way and the assessment of betterments therefor, under the St. of 1871, c. 382, should show the amount of the expense of the laying out or altering, as well as of the assessment.

A petition for a writ of certiorari to quash the proceedings of a tribunal of a city assessing a betterment tax on an estate for the laying out of a highway, under the St. of 1871, c. 382, alleged that the proceedings were void because it did not appear that the amount assessed was a proportional part of the expense of laying out and grading the street. The answer alleged that it sufficiently appeared by the records that the expense of laying out and grading the street was largely in excess of the amount assessed by the tribunal, and that the amount so assessed was a proportional part of said expense. The answer also alleged that, in fact, said expense was largely in excess of the amount assessed, and said amount was a proportional part of said expense. The record annexed to the petition showed

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an adjudication that the whole amount of benefit and advantage received by any real estate from the laying out of the street, beyond the general advantage to all real estate in the city, was $31,050, one half of which, viz.: $15,525, should be assessed upon the lots of land specially benefited, in proportion to the benefit and advantage received by each. By consent of the parties, the case was reserved for this court upon the petition and answer and a report of a single justice, which stated that the records did not show the actual expense of laying out and constructing the road, or that the amount assessed upon the lands benefited was a proportional part of said expense; but that, if it could be shown in this way, it could be proved by the books of public record of the city, and by parol, that the actual expense of laying out and constructing the road was between $21,000 and $22,000, and that the assessment of betterments was a proportional part of about two thirds of that sum. *Held*, that, although the record was defective in not showing the amount of the expense, yet that defect could be cured by an amendment of the record, and, upon the allegations in the answer, the agreement of the parties as to the effect thereof, and the facts found at the hearing, afforded no ground for a writ of certiorari to issue.

An order of the proper tribunal of a city, laying a betterment tax under the St. of 1871, c. 382, directed the tax collector to collect said assessment, with interest at twelve per cent. per annum. *Held*, on a petition for a writ of certiorari, which did not assign the order to collect interest as one of the errors, that the validity of the order laying the assessment was not affected thereby.

PETITION for a writ of certiorari to the board of aldermen of the city of Springfield. The petition alleged that on December 5, 1871, the city council of Springfield, by an order of that date, laid out and established a street from a point near the foot of Blake's Hill, in Springfield, to the X road, so called, with a uniform width of one hundred feet, and to be called Fort Pleasant Avenue; that the petitioner is, and at the time of the proceedings hereinafter set forth was, the owner in fee of two tracts of land lying and abutting on said avenue; and that on October 19, 1874, the board of aldermen of Springfield passed an order assessing upon said lands of the petitioner the sum of $3600 for benefits alleged to have been received by his said lands from the laying out and grading of said Fort Pleasant Avenue. The petition then alleged that said proceeding of the board of aldermen was irregular, illegal and void, for the following reasons:

"Because no grade line has been established to which said avenue is to be graded and worked.

"Because the work of laying out and grading said avenue had not been completed at the time when said assessment was made, and is not now completed.

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"Because the records of said board of aldermen do not show what was the actual expense of laying out and grading said avenue.

"Because the records of said board of aldermen do not show in a legal and proper form the actual expense of laying out and grading said avenue.

"Because it does not appear that the amount assessed is a proportional part of the expense of laying out and grading said avenue.

"Because, so far as the records show, the aggregate amount of assessments upon real estate on account of said avenue may greatly exceed the actual expense of laying out and grading the same.

"Because said assessment was made by the board of aldermen, and not by the board of mayor and aldermen."

Annexed to the petition was the report of the board of public works of the city of Springfield, dated October 12, 1874, and the order of the board of aldermen accepting the same, dated October 19, 1874.

The report, after reciting the reference to said board, upon the order of the mayor and aldermen, of the matter of assessing betterments under the St. of 1871, *c.* 382, upon lands specially benefited by reason of the laying out and grading of Fort Pleasant Avenue, notice given to all parties interested, and a hearing had, set forth that the board "adjudge and determine that the whole amount of benefit and advantage received by any real estate from said laying out and grading of Fort Pleasant Avenue, beyond the general advantage to all real estate in said city of Springfield, to be $31,050, one half of said adjudged benefit and advantage, viz.: the sum of $15,525, they are of opinion should be assessed upon the lots of land specially benefited, in proportion to the benefit and advantage received by each, as follows." Then followed a list of the assessments on various parcels of land, including two parcels belonging to the petitioner, upon which were assessed the sums of $3400 and $200 respectively. The report concluded as follows: "And they recommend that assessments be made of special benefits received by said real estate from the laying out and grading of said Fort Pleasant Avenue, upon the several lots of land and in the sev-

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eral sums above named, said sums being, in each case, one half of the adjudged special benefit and advantage to each lot of land respectively from said laying out and grading."

The order of the board of aldermen was as follows:

"City of Springfield. In Board of Aldermen, October 19, 1874. Ordered, that the accompanying report of the board of public works relating to the assessment of betterments on Fort Pleasant Avenue be and is hereby accepted and adopted, and that assessments of betterments occasioned by laying out and grading Fort Pleasant Avenue from Mill Street to Sumner Avenue, be made in all respects according to the recommendations of said report, which is hereby referred to and made part of this order, and the tax collector is hereby directed to collect said assessments, with interest at twelve per cent. per annum from October 20, 1874, upon all sums not paid on or before the twentieth day of November next."

The answer, which was signed by attorney, was as follows:

"And now comes the city council of the city of Springfield, and the board of aldermen of said city, and for answer to the petitioner say that they deny that the work of laying out and grading said avenue had not been completed at the time when the assessment referred to in said petition was made, and denies that the work of grading was then or is now incomplete, and denies that said grading left the petitioner without convenient access to his lands, and avers that if said access were inconvenient it would be no ground for granting the prayer of the petitioner.

"The respondents deny that said avenue is not now and has not been at any time in a safe condition for public travel, and aver that if the fact were as alleged it would be no sufficient ground for granting the prayer of this petitioner.

"And the respondents further aver that it sufficiently appears by the records of the mayor and aldermen, and of the city of Springfield, that the expense of laying out and grading said Fort Pleasant Avenue was largely in excess of the amount assessed under the order of the mayor and aldermen, annexed to the petition on file, and that the amount so assessed was a proportional part of said expense; and they further allege, apart from such record, that as a fact said expense was largely in excess of said

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amount assessed, and said amount was a proportional part of said expense.

"And except as hereinbefore admitted, all the allegations of the petitioner as to illegalities and irregularities in the proceedings of said assessment are denied by the respondents. And the respondents further allege that if any of the alleged irregularities are found to exist, they are mere matters of form not essential to the validity of the proceedings, and that in all important matters said proceedings are correct, and that substantial justice has been done, and that therefore the prayer of the petitioner ought not to be granted."

Hearing before *Colt*, J., who, by the consent of the parties, reserved the case for the full court upon the petition and answer, and a report, which, after stating that the copies of the records annexed to the petition, were made part of the case, proceeded as follows:

The following record was introduced in evidence: "City of Springfield, in Board of Aldermen, June 8, 1874. Ordered, that the matter of assessing betterments under and in accordance with the provisions of chapter 382 of the Acts of 1871, upon lands specially benefited by reason of the laying out and grading of Fort Pleasant Avenue, be referred to the board of public works, and that they be requested to make report thereon."

It appeared in evidence, by the testimony of the city clerk, that no grade line had ever been established by the city council, to which said Fort Pleasant Avenue should be graded and worked. The avenue, as wrought, varied in width from one hundred feet (the width named in the order of location for the entire street) to forty-five feet. It is constructed across two ravines, rendering embankments necessary; one of them being twelve feet high, and the other twenty-five feet high. No railing or other barrier has been erected at these points on the sides of the avenue. Before the commencement of proceedings for the assessment of betterments, the road had been properly completed and graded for public travel, unless the lack of railings or other barriers at the points above named, and the failure of the city council to establish a grade, would prevent a finding to that effect. The land of the petitioner abuts on said road fifteen hundred and forty feet in one part, and five hundred feet in another part.

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The records of the assessment of betterments by the respondents do not show the actual expense of laying out and constructing said avenue, or that the amount assessed upon owners of real estate supposed to be benefited is a proportional part of said expense. If it is competent to be shown in this way, it can be proved by accounts kept upon the books of public record of the respondents by its treasurer, and also by parol, that the actual expense of laying out and constructing the road is between twenty-one and twenty-two thousand dollars, and the assessment of betterments upon owners of real estate was a proportional part of about two thirds of that sum.

It can also be proved by parol evidence, if competent, that the mayor of said city was present at the meeting of the board of aldermen at which said order of assessment was made, and acted as presiding officer of the board.

H. Morris & W. L. Smith, for the petitioner. 1. No grade has been legally established. Until that is done, the street cannot be said to be graded. The grading of the street, as the term is used in the St. of 1871, *c.* 382, § 1, means the bringing of the surface to a definite line — either a level, or a defined and established slope or slopes. Such is the sense in which the term is used in the Gen. Sts. *c.* 43, §§ 85, 86. St. 1853, *c.* 315, § 2. When the court say, in *Reed* v. *Scituate*, 5 Allen, 120, 124, "the commissioners have exclusive authority to determine what the grade shall be," they evidently mean a definite grade capable of being described and recorded. It is obviously for the public interest that streets should be made upon a proper grade when first opened. A change of grade after expensive buildings have been erected by the abutters involves great expense to the public. *Morse* v. *Stocker*, 1 Allen, 150.

2. The street was laid and ordered to be constructed one hundred feet wide. If at the points where it crosses ravines the width of the surface is necessarily reduced, there should at least be an equivalent at such points by the erection of suitable railings or barriers. Until these are erected, the street is not safe for the use of the abutters or the public, and is not "completed." St. 1871, *c.* 382, § 1.

3. The authority to assess under the St. of 1871, *c.* 382, is limited to a proportional share of the expense of laying out and

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grading. The amount of that expense ought to be a matter of record to which the person assessed may refer for the purpose of ascertaining whether the assessment is proportional or whether it is excessive. He should not be required to rely upon the statements of employees of the city. He has a right to be informed by record of the various items of expense. The persons assessed have a right to know, from the record of the tribunal laying the assessment, the precise amount of expense which they are legally to pay. The respondents offer to supply their defective record by means of their books of account and by parol, but they do not offer to show in any manner what was the actual expense of laying out and constructing the street.

4. The respondents fix the total amount of benefits received by all the estates benefited at $31,050, and they assess one half that amount. Their order is merely to assess a proportional share of the benefits. It does not pretend to assess a proportional share of expense of laying out and construction. Upon the subject of the expenses the order is silent. It is not competent for the respondents to introduce evidence to contradict their own record. *Wilbraham* v. *Hampden*, 11 Pick. 322. *Rutland* v. *County Commissioners*, 20 Pick. 71. *Gleason* v. *Sloper*, 24 Pick. 181. *Mendon* v. *County Commissioners*, 5 Allen, 13.

5. The order of the board of aldermen which directs the collector of taxes to collect the assessment with interest is without authority of law.

M. P. Knowlton, for the respondents.

GRAY, C. J. The answer to this petition, containing allegations and denials of matters of fact, and signed by counsel, is irregular. *Tewksbury* v. *County Commissioners*, 117 Mass. 563. *Worcester & Nashua Railroad* v. *Railroad Commissioners*, 118 Mass. 561. But by consent of the parties the case has been submitted with the same effect as if the facts stated in the report appeared by a proper return made officially by the respondents.

1. The objection "because no grade line has been established" is not well founded. The statutes do not require that such a line shall be formally established and defined upon the record of the proceedings, except so far as may be necessary to a proper specification of the manner in which the new highway or alteration shall be made. Gen. Sts. *c.* 43, § 13. So far as the rights

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or liabilities of abutters are affected by the grade of the street, they depend on and are determined by the grade as actually constructed.

2. The objection "that the work of laying out and grading said avenue had not been completed" is not sustained in fact. The mere want of railings or barriers for the protection and safety of public travel does not prevent the board from proceeding to assess the expenses. *Whiting* v. *Mayor & Aldermen of Boston*, 106 Mass. 89.

3. The assessment, authorized by the St. of 1871, *c.* 382, § 1, is a tax, by which the expense of the laying out and construction of the way is apportioned as a public burden upon the lands especially benefited by the public improvement. The benefit or advantage to such lands is estimated only as a means of apportioning the tax and of providing a fixed limit of the amount to be assessed upon each estate. The fact of such benefit from the improvement furnishes a justification for the imposition of the tax upon a particular class of estates, instead of a levy in the general way of ordinary taxation. But such benefit conferred would not of itself alone warrant the exaction of money by way of compensation therefor. The estates are assessed, not for the benefit conferred, but for the cost of the public improvement. The essential point in the proceeding is the expenditure for a public service, for which taxation in some form is required.

The record of the board of aldermen is defective in not showing what the amount of that expense was. But the defect may and should be cured by an amendment of that record, and, upon the allegations in the answer, the agreement of the parties as to the effect thereof and the facts found at the hearing before a single justice, affords no reason why the court, in the exercise of its discretion, should order a writ of certiorari to issue. *Farmington River Water Power Co.* v. *County Commissioners*, 112 Mass. 206. *Noyes* v. *City Council of Springfield*, 116 Mass. 87. The order of the board of aldermen, taken in connection with the facts thus alleged and admitted, shows that each estate has been assessed, in proportion to the benefit and advantage received, a share of the expense of laying out and construction, not exceeding the whole amount of that expense, nor half the amount of the benefit and advantage to all the estates.

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4. The objection that the record does not show that the mayor was present at the meeting of the board of aldermen was not insisted upon at the argument, and no objection was taken to the proceedings for want of the concurrence of the common council. See Sts. 1852, *c.* 94, §§ 8, 14; 1871, *c.* 382, § 1; *Day* v. *Aldermen of Springfield*, 102 Mass. 310; *Powers* v. *City Council of Springfield*, 116 Mass. 84.

5. The order to collect twelve per cent. interest is not one of the errors assigned in the petition, and does not affect the validity of the order laying the assessment. *Petition dismissed.*

AMELIA K. WHITFORD *vs.* INHABITANTS OF SOUTHBRIDGE.

Worcester. Oct. 7, 1875. — March 4, 1876. AMES & LORD, JJ., absent.

In an action against a town, for personal injuries caused by a defect in a highway, the defendant requested a ruling that the plaintiff could not recover unless she satisfied the jury that the injury was caused by the defect in the way without fault on her part. The instruction given was that "the plaintiff must satisfy the jury that she was in the exercise of due care at the time of the alleged injury, and if a want of due care on her part contributed in any degree to the injury she cannot recover, though it would not have occurred except for the omission of the town to perform its duty." *Held*, that the request did not call the attention of the presiding judge to the rule of law that it must appear that the injury was caused solely by a defect in the way, but only to the question of contributory negligence on the part of the plaintiff, and that the defendant had no ground of exception.

In an action against a town for personal injuries caused by a defect in a foot-path, by the side and within the location of a highway, instructions were requested that the jury could not find "merely" from certain specified circumstances that the town had recognized the path as a part of the highway that they were bound to keep in proper condition for travel. *Held*, that such instructions were properly refused; and that the recognition and adoption of the path by the town was a question of fact for the jury to determine, in view of all the evidence in the case.

A person, knowing the unsafe condition of a part of a foot-path by the side of a highway in a town, fell and was injured in the attempt to pass over it. In an action brought against the town for the injuries caused by the alleged defect, the defendant requested the judge to instruct the jury that the plaintiff's election, with such knowledge, to travel along the path instead of by the safe portion of the way might be considered by them as such want of due care upon her part as would prevent her recovering. The judge ruled that such knowledge would not be conclusive that the plaintiff did not exercise due care; but that if, with her knowledge, the plaintiff did not exercise due care and prudence, either in entering upon the way or in proceeding thereon after she had entered, she could not recover. *Held*, that this ruling properly left the jury to determine whether there was any want of due care in going upon the foot-path.

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TORT for personal injuries alleged to have been sustained by the plaintiff in consequence of a defect in a highway in the defendant town. Trial in the Superior Court, before *Dewey*, J., who allowed a bill of exceptions in substance as follows:

The street had originally been laid out and constructed by the Hamilton Woollen Company, and in 1846 was laid out and accepted by the defendant.

The plaintiff offered evidence tending to show that she was a person seventy-two years old, residing with her son, who owned he premises abutting on the highway at the place of the accident; that she came out of her son's house and went down a flight of three steps, which led down from the bank on which her son's house stood to the location of the highway, and proceeded along a part of the location used as a sidewalk; that such walk was ledgy, uneven and unsafe, and that while on this part of the way, opposite her son's premises, and using due care, she fell and was hurt. Her own testimony as to the occurrence of the accident was as follows: "I came down the steps and walked three or four feet on the sidewalk, going north down the street, and I fell; my feet went against something, I do not know what; and broke two bones right in my ankle joint. I was going careful as I could. I was walking right on the sidewalk. I don't know but I stepped on something, and I don't know as I did." On cross-examination she testified: "It never has been a safe place. I knew perfectly well its character. I considered it a bad place. I don't think it ever has been a safe place. I always felt it was a bad sidewalk for any one to go on. I was not thinking particularly about it at the time."

The plaintiff also offered testimony tending to show that she was found lying on the sidewalk, with her leg broken, in the position in which she described herself as lying, about two feet from the north end of the steps. This was all the evidence as to the mode of the occurrence of the injury.

The plaintiff further offered evidence of persons accustomed to pass that way and living on the street, that at the time of the accident, and for many years before, the greater part of the foot travel passed along said portion of the location. Evidence was also introduced as to the situation and condition of said sidewalk at and prior to the time of the injury to the plaintiff; and that

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one Whitford, the adjacent owner, wheeled some material from his garden, which he spread over the ledgy part above described, and that afterwards a person, who was mending the road for the town, removed some material, using the gravel to crown up the middle of the street, and carrying off the stones which remained to a distant place. The plaintiff contended that this was to improve the walk. The defendant contended that it was not to improve the walk, and had no such effect, but was a mere taking of materials found within the location to improve the wrought part of the road.

The plaintiff also offered evidence tending to show that the town had laid out and constructed a sidewalk on that side of the street, northerly of the point in question, extending from Main Street to a point about forty or fifty feet from the place of the accident; that, from the point where the sidewalk so constructed terminated, a smooth foot-path extended to the uneven and ledgy place on which the accident happened; that said uneven and ledgy place extended about twenty feet, and southerly of said place a smooth, even path extended some distance further south; that between the carriage way and the sidewalk so constructed by the defendant, a gutter had been made and paved by the defendant, and that a depression, of substantially the same shape and size as the paved gutter, extended south from the paved gutter between the carriage way and the smooth path leading from said sidewalk to said uneven, ledgy place, and extending past the ledgy place and past the smooth path south of the ledgy place, and forming a continuous gutter or watercourse between the carriage way and the walk on the side of the road; that said sidewalk, so constructed by the town, and the smooth paths northerly and southerly of the said uneven and ledgy place, and the uneven and ledgy place itself, were substantially one continuous grade, and all on about the same grade relatively to the carriage way; that there was no method provided for the foot travel passing over the sidewalk constructed by the defendant to pass from the sidewalk to the carriage way at the point where said sidewalk terminated near the ledgy place, except by crossing the said gutter, without any bridge, flagging or other means of getting over.

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The defendant offered evidence tending to show that the highway had a made way in the centre of the location wrought for and sufficient for the public travel; that the town had never laid out or wrought the remainder of the location, including the part where the plaintiff was travelling, for the public use; that it was visibly unsafe and unfit for the purpose, and known to be so by the plaintiff, and that the greater portion of the foot travel went over the wrought centre of the location, although sometimes persons passed over the part where the plaintiff was travelling.

Evidence was further offered by the defendant that the place in question was formerly, and after the construction of the road, a bank three or four feet above the level of the wrought portion, and that an adjacent owner had many years before removed the earth from said bank, leaving the ledge bare, and put steps from his premises down to the walk, and had not levelled the walk or fitted it for travel.

The defendant requested the judge to instruct the jury as follows:

"1. The evidence in the case is not sufficient to entitle the plaintiff to recover.

"2. There is no evidence which tends to show that the injury of which the plaintiff complains was caused by any defect in the highway.

"3. There is no evidence which warrants the jury in finding that the portion of the way where the plaintiff claims to have been injured was held out by the defendant as designed for public travel.

"4. There was no evidence upon which the jury would be warranted in finding that the plaintiff was in the exercise of due care.

"5. If the town had prepared within the limits of the location of the highway, a strip of twenty-five feet in width, being a reasonable and proper width, and sufficient in all respects for all purposes of public travel, both as regards safety and convenience, they were not bound to prepare the entire width of the location of forty feet for such purpose.

"6. The town was not bound to prepare for the inhabitants of adjoining estates the means of getting from their estates upon the location of the highway, or of crossing that portion of the

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highway not designed, wrought or appropriated for public travel, from their adjoining estates to the portion of the way so designed, appropriated or wrought, and if a person coming upon the highway from an adjoining estate in crossing to the part of the way so wrought, designed or appropriated, and before reaching the same, sustains an injury, the town is not liable.

"7. If the jury shall find that the town constructed and maintained within the location a safe and convenient way of sufficient width and suitable in all respects for all purposes of public travel, leaving a bank between such way and the limit of the location unfit and unsuitable for travel, and several feet higher in grade than the way so prepared, and the owner of the adjacent premises removed the earth from said bank, leaving between said wrought way and said limit a ledge of rocks, uneven, sharp and unfilled, and unsafe and inconvenient for such travel, and the town did no act, either to repair or work upon said ledge, or in any manner to adopt or recognize it as used, fitted or appropriated for public travel, the mere use of it by persons knowing or having reason to believe all these facts, but choosing to take whatever risk might attend walking over such ledge, would not render the town liable for failure to make the same safe and convenient, even if such acts had been so extensive or long continued or notorious that the town may be presumed to have knowledge of it.

"8. A town is not liable for defects and obstructions within the bounds of the way as laid out; but outside of the travelled path.

"9. To make the town liable for failure to render safe and convenient a portion of the way never wrought or designed by it for travel, there being a sufficient way so wrought and designed by it within the location by reason of the use of such portion by the public, there must be such a long continued public and notorious use and enjoyment by the public as to amount to a recognition of it as a wrought and completed part of the way.

"10. The town is not liable for a failure to make safe and convenient a portion of the location outside the travelled path merely because, with the knowledge of the town and without its objection, such portion is used for public travel, if such public

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travel is only by persons who know the elevation and condition of the street, and have reason to know when they use it that the same was not designed or appropriated by the town for such use.

"11. If the plaintiff, knowing that the part of the way on which she was travelling was unsafe and inconvenient, and had never been adapted by the town for travel, elected to travel along the same, instead of proceeding directly to the portion of the way which was safe and convenient, the jury may consider such election as a want of due care on her part, which will prevent her recovery.

"12. If persons travelling on foot choose, for purposes of shortening their route, or of avoiding dirt or mud, to pass over a portion of the location which they have reason to know is not safe and has not been designed or adapted by the town for such use, there being a sufficient way provided, the jury cannot infer, from such use alone, a holding out of such portion of the way by the town as intended or designed for travel.

"13. The authorities of the town, and not travellers, are entitled to determine what portion of the location, such portion being always sufficient, reasonable and safe, shall be prepared for public travel; and no portion of the public, by simply using any part of the location, however unsafe or inconvenient, can impose upon the town the obligation or burden of blasting out ledges, or otherwise repairing portions of the location not needed for the reasonable use of the public.

"14. It is not enough for the jury to be satisfied that the plaintiff sustained an injury and that the highway was in some part unsafe or inconvenient. The plaintiff cannot recover unless she further satisfies the jury that the injury which she sustained was caused by the defect in the way, without fault on her part.

"15. If the condition of the ledge was such as to advertise and inform all persons who were about to go over it that it was unfit and unsafe, and never had been wrought, completed or designed by the town for public travel, the mere fact that a large number of persons chose to go over it, instead of going over the part actually prepared and fitted for travel, does not oblige the town to make it safe and convenient as a part of the way designed or held out for public travel."

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The judge declined to give the instructions requested, and instructed the jury as follows:

"1. It is the duty of towns to keep ways safe and convenient for travellers on foot or in carriages, at all seasons of the year. These highways are of different width from two to six rods.

"2. A town is not bound to work and prepare for public travel the whole of the land within the limits of the way, but only such portions as are reasonably necessary for that purpose.

"3. A town is not necessarily chargeable with damage arising from every defect existing within the located limits of a highway. Nor would it be liable for obstructions or defects in portions of the highway not a part of the travelled path, and not so connected with it that they would affect the safety or convenience of those travelling on the highway and using the travelled path; nor would the town be legally liable when an injury was sustained by a party using the road for the purpose of passing from his own land, although it was caused by a defect within the limits of the highway, if it was outside the part of the road used for public travel.

"4. The town is not bound to prepare for abutters the means of passing from their estates to the adjoining highway, or of crossing from that part of the highway, not appropriated to travel, to that part which is so appropriated.

"5. It was the duty of the town to keep and maintain safe and convenient, for the public travel, those parts of the highway which were the travelled paths, and held out to the public as intended and designed by the defendant for that purpose, and were so used.

"6. The travelled path is that which, with the knowledge and acquiescence of the town, is used for public travel within the located limits of the highway.

"7. It is a question for the jury whether the foot-path, on which the plaintiff alleges she met with the injury, was so connected with the wrought part of the road, or with the carriage way, and so used for travel, as to make the town liable for its condition.

"8. From the length of time this path had been there in its then situation, and from the public notoriety of the fact, the jury may find whether this foot-path, by long continued public

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use, with the knowledge and acquiescence of the town, was recognized as a part of the wrought and finished track.

"9. If the defendants had themselves constructed this sidewalk, they would of course have been responsible to keep it in repair. But if it had been constructed by others, there may be, on the part of the town, such an adoption of the acts of those who constructed it, and such a long continued public and notorious use and enjoyment of the sidewalk as to amount to a recognition of it as a wrought and completed part of the way, and this is a question of fact for the jury.

"10. The plaintiff must satisfy the jury that she was in the exercise of due care at the time of the alleged injury; and if a want of due care on her part contributed in any degree to the injury, she cannot recover, though it would not have occurred except for the omission of the town to perform its duty. A knowledge of the condition of the way and its alleged defects would not be conclusive that the plaintiff did not exercise due care; but where a person had knowledge of defects, or reason to apprehend any danger, a much greater degree of care and circumspection would properly be required of such person; and if, with her knowledge, the plaintiff did not exercise due care and prudence, either in entering upon the way, or in her proceeding thereon after she had entered, she cannot recover. And whether with her knowledge, and under all the circumstances, the plaintiff is in the exercise of due care, is a question for the jury to determine."

The jury returned a verdict for the plaintiff for the sum of $850; and the defendant alleged exceptions.

G. F. Hoar & A. J. Bartholomew, for the defendant. 1. The whole evidence as to the cause of the injury to the plaintiff was, that she was walking carefully over an unsafe way; her foot went against something; she does not know whether she stepped on something; she fell and was hurt. Upon this evidence it was a practical question, to which the attention of the jury should have been distinctly called, whether the defect in the way caused the injury. The defendant requested the judge to instruct the jury: 1. That the evidence was not sufficient to entitle the plaintiff to recover. 2. That there was no evidence tending to show that the injury was caused by a defect in the way. 3. That

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"it is not enough for the jury to be satisfied that the plaintiff sustained an injury and that the highway was in some part unsafe or inconvenient. The plaintiff cannot recover unless she further satisfies the jury that the injury she sustained was caused by the defect in the way." The judge declined to give all these instructions; on the contrary, he stated the questions of fact upon which the jury were to pass, with such instructions as he deemed appropriate to each. If the jury followed the course indicated by the charge, they could have inquired: 1. Was the plaintiff hurt in the highway? 2. Was she hurt in a part appropriated to travel? 3. Was she using due care? And if they had found all these questions in the affirmative, they would have found for the plaintiff.

The instructions omitted all mention of that element of the well settled rule in this class of cases, requiring the jury to find the sole cause of the injury to be a defect in the way. *Babson* v. *Rockport*, 101 Mass. 93. The defendant insists that there was no evidence which warranted the jury in finding that the injury was caused by any defect in the highway.

2. The judge should have instructed the jury what was such a "use by the public with the knowledge and acquiescence of the town," as would bring the case within the rule laid down in *Weare* v. *Fitchburg*, 110 Mass. 334. In that case there was shown "a smooth level sidewalk, four feet wide, extending about a quarter of a mile, which the jury might have found was to all appearance as much a part of the highway as the carriage track was." The judge extracted from the opinion in *Weare* v. *Fitchburg* certain sentences, which were in that case not only a correct, but an ample and adequate statement of the law. But the defendant submits that a further instruction and explanation was properly asked, when the rule is to be applied to a case where a portion of the public, with full knowledge of its condition, elect to travel over a part of the way which it knew the town had never designed for that use. The instructions asked upon the evidence in the case were appropriate and necessary to constitute a sound rule, fixing the liability of towns in cases like this. The last instruction requested should have been given.

3. The judge erred in instructing the jury as matter of law that "a knowledge of the condition of the way and its alleged

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defects would not be conclusive that the plaintiff did not exercise due care." It was a fact for the jury to find, and it was for them to determine whether these facts were conclusive or not. The judge should, therefore, have confined himself to stating that such knowledge was not held to be conclusive as matter of law. The instruction asked on this point was accurately stated, and should have been given. The defendant prayed for the distinct rule, that the jury were at liberty to find, that going upon this dangerous way was an act alone, and taken by itself, showing a want of due care. But this instruction was refused in form and substance, and that actually given stated simply that greater care was required when the defects were known. *Whittaker* v. *West Boylston*, 97 Mass. 273. *Frost* v. *Waltham*, 12 Allen, 85.

F. P. Goulding, (*J. M. Cochran* with him,) for the plaintiff.

DEVENS, J. It is well settled that in an action of this nature it is not sufficient for the plaintiff to show only that she was injured while walking in the highway and using due care, but that it must further appear that the injury was caused solely by a defect in the way. *Babson* v. *Rockport*, 101 Mass. 93. *Bemis* v. *Arlington*, 114 Mass. 507. The instruction requested by the defendant, that "the plaintiff cannot recover unless she further satisfies the jury that the injury which she sustained was caused by a defect in the way without fault on her part," did not, however, call the attention of the presiding judge to this familiar rule of law, but only to the question of contributory negligence on the part of the plaintiff. As thus requested, it was substantially given by the ruling that if the want of due care on the part of the plaintiff "contributed in any degree to the injury, she cannot recover, though it would not have occurred except for the omission of the town to perform its duty." The necessary inference was that the plaintiff was to recover, if at all, on account of the occurrence of the injury from a defect in the way existing by reason of the neglect of the town to perform its duty.

Both the instructions requested, and those given in reply to them, relate mainly to the liability of the defendant for the condition of that part of the way where the injury occurred and to its responsibility for defects therein. This part of the way

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was a path within the limits of the highway, but outside of that portion wrought for carriage travel; and if the instructions were correct and there was no deficiency in them, the defendant has no ground of complaint. The evidence which tended to show that this path was unsafe and that the plaintiff was walking carefully, would warrant the jury in finding that while using due care the plaintiff was injured by reason of the defect in the way.

These instructions, which were largely in the language used in the opinion of this court in *Weare* v. *Fitchburg*, 110 Mass. 334, submitted as a question of fact whether there had been an adoption and recognition by the defendant of this path as a portion of the wrought and finished track so that the town would be liable for defects therein. The jury were to take into consideration the position and character of the path, its relation to the main wrought road, the length of time it had been in its then situation, the public notoriety of the facts, and were to determine whether by long continued public use, with the knowledge and acquiescence of the defendant, it had been thus adopted and recognized. From the nature of the case it would not have been possible to have given an exact rule as to the relation the path should have been shown to bear to the main wrought road, or the amount or character of its use, in order to render the town liable. The use which, in connection with other facts, was to furnish evidence of such recognition, was sufficiently defined as a "long continued public use."

Instructions were asked substantially to the effect that if the condition of the ledge (where the path was situated) was such as to inform all persons that it was unsafe, the mere fact that a large number chose to go over it would not oblige the town to make it safe; also, that if a large number of persons chose, for the purpose of shortening their route, to pass over a portion of the road not safe and not designed nor adapted for public travel, the jury could not infer from that use alone a holding out of such portion for travel; and further that if persons, who knew the character of the street and had reason to know that it had not been appropriated to public use, saw fit to use and did use it for public travel, the town would not be liable to make it safe and convenient, merely because this was done. These requests

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were properly declined. So far as appears by the bill of exceptions, there was no evidence as to the motives or knowledge of those who used this path, nor did the plaintiff rely on the mere fact of any such use as was thus stated. The presiding judge could not have been properly asked to rule that a portion of the evidence did not sustain the plaintiff's case. The almost necessary effect of such instructions, if given, would have been to draw the attention of the jury from the inquiry whether this was a travelled path within the limits of the highway held out by the defendant to the public as intended and designed for travel and was so used with the knowledge and acquiescence of the town. All the circumstances attending this use were proper to be considered in connection with this question.

The defendant contends that the instruction requested, that the jury were at liberty to find that the act of going upon this dangerous way was in itself an act showing a want of due care, was not given, but in place thereof only a ruling that greater care was required where defects were known. This suggestion is, however, erroneous. The jury were told that "if, with her knowledge, the plaintiff did not exercise due care and prudence either in entering upon the way, or in her proceeding thereon after she had entered," she could not recover. This certainly left the jury to determine whether there was any want of due care in going upon the way. *Exceptions overruled.*

City of Worcester *vs.* Francis H. Kelley & others.

Worcester. Jan. 5. — March 7, 1876. Ames & Devens, JJ., absent.

Land was conveyed to a city in trust for the purpose of building a hospital thereon. By the terms of the deed, the city was to make an appropriation of twenty-five thousand dollars for the purpose, and to build a hospital, or part of a hospital, of a certain size, upon the land within three years, or, failing to do so, to pay the grantor, or his legal representative, the sum of two hundred dollars a month; and the land was not to be sold for twenty-five years, and then only upon the opinion of three fourths of the board of trustees that it was unsuitable for a city hospital, and upon the setting apart of a sum of money equal to the value of the land, as then ascertained by three appraisers, as a permanent fund for the city hospital. The city was duly authorized by the Legislature to erect and maintain a city hospital, and accepted the grant of the said land. The grantor by his will, after devising

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all the residue of his estate to the city in trust, to be by it applied for the sole use and benefit of the city hospital, provided as follows: "While I would not wish to give any particular direction to the bequest, nor incur the risk of defeating the purpose I have in view in making it, by imposing any limitations or condition as to the manner of its use, still I should prefer to see it set apart as a separate fund, and the income thereof only applied to the support and maintenance of said hospital, if such course shall commend itself to the wisdom of those having it in charge." *Held*, that a bill in equity brought by the city after the death of the grantor and within three years after the grant, seeking to release the city from the obligation of building a hospital upon the land within three years from the date of the deed, and to enable the city to sell the land immediately for its own benefit, on the ground that the city had made other provisions for a suitable and convenient city hospital elsewhere, that it would be inexpedient and unnecessary to erect a hospital on the land, and that said land, on account of its situation, its northern exposure and nature of its soil, was not a suitable, convenient or wholesome place for the erection of a hospital for the reception and care of sick persons, could not be maintained.

BILL IN EQUITY, filed November 24, 1874, by the city of Worcester against the trustees of the Worcester City Hospital, the heirs and executors of George Jaques, and the Attorney General, alleging the following facts:

By the St. of 1871, *c.* 339, passed May 25, 1871, the city of Worcester was authorized "to erect, establish and maintain a hospital for the reception of persons who, by misfortune or poverty, may require relief during temporary sickness," and the city council of said city was empowered "to make such ordinances, rules and regulations as they may deem expedient, for the appointment of trustees and all other necessary officers, agents and servants for managing the said hospital."

On June 26, 1871, the city council passed an ordinance, which is now in force, establishing a hospital accordingly, and providing for the appointment of a board of trustees for the management of the hospital and of all funds and real and personal property received by the city by gift or bequest for the benefit of the hospital, and afterwards elected a board of trustees under the ordinance. The city established a city hospital for the reception of patients, and the city council made annual appropriations for its support and maintenance.

On March 12, 1872, George Jaques conveyed to the city a parcel of land in Worcester, to be held by the city, its successors and assigns, in trust nevertheless, and for certain charitable uses and purposes set forth in the deed as follows:

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"1. The said parcel of land shall be forever appropriated and used, except as hereinafter otherwise provided, as a site for a public city hospital, to be erected, established and maintained thereon by said city of Worcester in its municipal capacity, in the manner authorized by law.

"2. The city council of said city shall, on or before the fifteenth day of April next after the date hereof, make an appropriation of not less than twenty-five thousand dollars for the erection on said parcel of land of a hospital building, or of a part of a hospital building; and said building or some part thereof shall, within three years after the date hereof, be so far completed as to afford reasonably comfortable accommodations for at least twenty-five patients of such classes as said city is now authorized by law to receive and care for in its city hospital; and if said hospital building or some part thereof shall not within said three years be so completed and furnished, then the said city shall forfeit and pay to me or to my legal representative, at the expiration of said three years, the sum of two hundred (200) dollars a month from the date hereof, without interest, and shall thereafter continue to pay to me, or to my legal representative, the sum of two hundred (200) dollars a month, without interest, until such accommodations for twenty-five patients shall be furnished as above provided. No hospital building, or part of a hospital building, shall be placed or built on said parcel of land, for twenty-five years from the date hereof, until the plan of such building or part thereof shall have been approved by a vote of said city council, and also by a vote of the board of trustees of the city hospital of said city. And no hospital or building erected upon said parcel of land shall ever, either before or after the expiration of twenty-five years from the date hereof, with the knowledge or consent of said board of trustees or by permission of the city council of said city, be used for the reception of persons sick with diseases dangerous to the public health.

"3. The city council of said city shall, within two years from the date hereof, by its decree, lay out and widen said Prince Street as a public street, to a width of fifty feet, and lay out the same as near as may be in a straight line parallel with Chandler Street, from King Street to Wellington Street, a distance of about two thousand feet; and said Prince Street shall be so

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made as to be in a reasonably good condition for carriages to pass over it from King Street to Wellington Street; said widening of said Prince Street to fifty feet shall be made half on each side or wholly on its southerly side, as said city council shall see fit to lay out the same; and I hereby grant to said city the right to lay out and maintain said Prince Street over any land now owned by me which shall be comprised within the limits of said street when so laid out and widened; and I hereby further grant to said city the right to cut and fill any portion of said Prince Street for its entire length, from King Street to Wellington Street, as the city council of said city shall determine; and I request that the name of said Prince Street may be changed to Hospital Street.

"4. The city council of said city shall within two years from the date hereof, by its decree, lay out and widen said Wellington Street as a public street, to a width of fifty feet from the northwesterly line of Main Street to a point where the northerly line of said Prince Street, as above to be extended, shall intersect with the said Wellington Street, the said Wellington Street to be widened wholly on its southerly side, unless the said city council shall decide to widen it partly on its northerly side. The remaining portion of said Wellington Street shall not be widened on its southerly side without my consent, for a period of ten years from the date hereof, by any order of said city council; but I hereby grant to said city the right to lay out and widen said remaining portion of Wellington Street as a public street, to a width of fifty feet over any land now owned by me adjoining said street, after the expiration of said period of ten years from the date hereof.

"5. The board of trustees of said city hospital shall have the exclusive care and management of said parcel of land during all the time that said parcel of land shall be occupied for hospital purposes as herein provided; and my desire is that for the period of twenty-five years from the date hereof, no tree on said parcel of land shall be injured or taken down, except by the consent in writing of three fourths of the members of said board of trustees.

"6. At any time after the expiration of twenty-five years from the date hereof, if, in the opinion of three fourths of the

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members of said board of trustees, said parcel of land shall for any reason be unsuitable for the purposes of a city hospital, then the said city in its corporate capacity may occupy the whole or any part of said parcel of land for school purposes or for other uses, or may sell the whole or any part thereof; provided however, that before the occupation or use of said parcel of land for other purposes than for a city hospital, and before the selling of any part of said parcel of land, the said trustees shall cause said parcel of land, apart from the buildings thereon, to be appraised by three competent men chosen by said trustees, one of said men to be a resident of the city of Boston, in said Commonwealth, and the other two to be residents of said city of Worcester, and thereupon a sum of money equal to the amount of such appraisal shall be immediately set apart and expressly established forever by said city of Worcester, as a permanent fund which shall not be diminished, and the income of said fund shall be forever devoted to the institution now known by the name of the 'Worcester City Hospital,' according to an ordinance entitled 'An ordinance relating to the City Hospital,' passed by the city council of said city June 26, 1871."

The city accepted said deed, and agreed to carry into full effect all its provisions, and to be bound thereby, and the city has in all respects complied with the terms and conditions of said deed, but has not erected, or begun to erect, a hospital building on the land thereby conveyed.

George Jaques died August 24, 1872, leaving a last will dated May 29, 1872, which had been duly proved and letters testamentary issued to the executors named therein. The testator, in and by his said will, after providing for the payment of his debts, funeral expenses and charges of administration, and directing the payment of certain pecuniary legacies, devised and bequeathed all the rest and residue of his property, real and personal, to the city of Worcester, in trust for the use and benefit of said city hospital, said devise and bequest being contained in the eighth and ninth clauses of his will, as follows:

"8. I have been convinced for some time that the city of Worcester, containing within it as it does so many elements of prosperity, thrift and rapid growth, has no greater want to be supplied than that of a well endowed and properly managed gen

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eral hospital which can minister to the comforts of the sick and unfortunate among the poorer classes of the city's population, by furnishing that care, nursing and medical skill which otherwise they never would receive.

"I have already given evidence of my conviction upon this point by the gift recently made to the city for that object, but at the same time I realize how little that alone can do towards the proper and full accomplishment of the work, or even to such a degree as to render it of any permanent and real value to those for whose comfort and well being it is designed.

"In making disposition of the balance of my property, situated as I am, with no relation likely to survive me nearer than cousins with whom I have never been on terms of intimacy, and many of whom are comparative strangers to me, I have thought I could not be the instrument of more good to my fellow men, or serve a better purpose with said balance of my estate, than by contributing still more to the object above named. Therefore,

"9. All the rest, residue and remainder of my estate, real, personal or mixed, not herein otherwise disposed of, of which I may die seised and possessed, or to which I may in any way be entitled at the time of my decease, whatever the same may be, wherever it may be or be situated, or however it may be known, designated or described, I give, devise and bequeath unto the city of Worcester, in trust, however, to be by the city applied to the sole and particular use and benefit of the institution recently established and known as the Worcester City Hospital, and to no use or purpose other than that whatsoever. While I would not wish to give any particular direction to the bequest nor incur the risk of defeating the purpose I have in view in making it, by imposing any limitations or condition as to the manner of its use, still I should prefer to see it set apart as a separate fund, and the income thereof only applied to the support and maintenance of said hospital, if such course shall commend itself to the wisdom of those having it in charge."

The bill further alleged that a large personal and real estate had vested in and was now held by the city under said will, for the charitable uses and purposes in said will declared; that the city had made other provisions for a suitable and convenient city hospital building; that it would be inexpedient and unnecessary

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to erect a hospital building on said land at the present time or within three years from the date of said deed; that said land, on account of its situation, its northern exposure and the nature of its soil, is not a suitable, convenient or wholesome place for the erection of a hospital for the reception and care of sick persons; that other land, more suitable and available for said purpose, can readily be obtained; that the city had already established a city hospital on land which was devised to the city under said will of George Jaques, and which is better adapted to said purposes; that it is necessary and expedient that a sale and conveyance of the land conveyed by said deed should be made, and the proceeds invested for the use and benefit of said hospital; that James Jaques, one of the defendants, had released to said executors all his interest in said estate, and the executors had conveyed the same to the city.

The prayer of the bill was that the city might be relieved from the obligation of building a hospital building on said land within three years from the date of said deed, and that a conveyance of said land and the investment and application of the proceeds for the purposes of said hospital should be decreed, and for other relief.

The executors filed an answer disclaiming all interest in the matters set forth in the bill. The trustees of the city hospital filed an answer admitting the allegations of the bill, and consenting that the prayer of the bill might be granted. The bill was taken for confessed against James Jaques. Sabra Carter, one of the heirs at law of George Jaques, appeared and filed a demurrer, assigning for cause that the plaintiff had not in the bill made or stated such a case as entitled it to any relief whatever.

The case was heard and reserved by *Gray*, C. J., upon the bill and the demurrer, for the consideration and determination of the full court.

B. F. Thomas, for Sabra Carter.

T. L. Nelson, for the plaintiff.

GRAY, C. J. By the terms of the deed executed by George Jaques and accepted by the city, the city took the land for the purpose of building a hospital thereon; the city was to make an appropriation of twenty-five thousand dollars for the purpose,

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and was to build a hospital, or part of a hospital, of a certain size, upon the land, within three years, or, failing to do so, to pay to the grantor or his legal representative the sum of two hundred dollars a month; the land was not to be sold for twenty-five years, and then only upon the opinion of three fourths of the board of trustees that it was unsuitable for a city hospital, and upon the setting apart of a sum of money equal to the value of the land, as then ascertained by three appraisers, as a permanent fund for the benefit of the Worcester City Hospital.

The right to the monthly sum of two hundred dollars, payable by the terms of the deed to the grantor or his legal representative, vested, upon his death, in his executor or administrator. *Cox* v. *Curwen*, 118 Mass. 198. By virtue of the residuary clause in his will, it would pass to the city; yet not as absolute property, but in trust for the benefit of the Worcester City Hospital.

There is nothing in the will, which manifests any intention to vary the provisions of the deed, or to authorize a sale of the land except at the time and under the restrictions therein stated. The donor may well have considered that if a hospital should not be erected on the land granted, the land would increase in value so much during twenty-five years, that his charitable purpose would be best promoted by not selling the land before the expiration of that time. But whatever his reasons were, the terms of his grant, to which the city, by accepting it, assented, are plain. Even if, as the city now alleges, the land is an unsuitable place for a hospital, whatever weight that consideration may have upon the question whether a hospital shall be immediately built there, it has no tendency to show that the alternative undertaking of the city to pay two hundred dollars monthly cannot be carried out.

The object of the present bill is to release the city from the obligation of building a hospital upon the land, and of appropriating twenty-five thousand dollars for that purpose, or, failing so to build, of paying two hundred dollars monthly; and to enable the city to sell the land immediately, in violation of the terms of its contract with the donor, and thus to avail itself of the whole value of the gift, without performing its part of the contract, or paying any of the sums of money which it had bound itself to pay out of its own funds.

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The only reasons alleged are that the city has made other provisions for a suitable and convenient city hospital elsewhere; that it would be inexpedient and unnecessary to erect a hospital on this land; and that "said land, on account of its situation, its northern exposure and the nature of its soil, is not a suitable, convenient or wholesome place for the erection of a hospital for the reception and care of sick persons."

It does not appear that there are any facts which did not exist or were not known to the city at the time of accepting the deed of the donor, and no case is shown for inducing a court of equity to assist the city in violating its contract with him.

Bill dismissed.

STEPHEN HENRY & others *vs.* LUTHER THOMAS & another.

Plymouth. January 24. — March 4, 1876.

The words, "greater part of them in interest," in the Gen. Sts. *c.* 148, § 2, providing that the proprietors of meadow and swamp lands, "or the greater part of them in interest," may apply by petition to the Superior Court for the improvement of the lands, relate to the proprietors having the greatest interest in value, and not to those owning the largest territorial area.

PETITION, under the Gen. Sts. *c.* 148, to the Superior Court, by three proprietors of meadow lands in Marshfield, for the appointment of commissioners to prescribe the measures to be adopted for making certain improvements thereon. The other proprietors, two in number, were made respondents. Hearing before *Putnam*, J., who granted the petition, and allowed a bill of exceptions, so much of which, as is material to the point decided, appears in the opinion.

P. Simmons & B. W. Harris, (*P. E. Tucker* with them,) for the respondents.

C. G. Davis, for the petitioners.

DEVENS, J. Many objections have been made by the respondents to this proceeding which it is unnecessary to discuss, as we are of opinion that there is one which is necessarily fatal to it.

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In order to initiate the proceeding, it is provided that the proprietors, or "the greater part of them in interest," shall apply to the Superior Court setting forth the proposed improvements and the reasons therefor." Gen. Sts. *c.* 148, § 2. At the trial the court ruled that by the words "greater part in interest" was meant those having the greater part in extent of territorial area and not in value of interest. This ruling was erroneous; the more obvious meaning, that such proprietors shall have the greater interest in value, is fortified by the whole character of the proceeding. By it the proprietors of the meadow or swamp are treated as owners of a common property whose individual rights must be subjected to such modifications as the commissioners may judge most practicable to secure the best advantage of all. *Coomes* v. *Burt*, 22 Pick. 422. *Lowell* v. *Boston*, 111 Mass. 454, 469. In questions concerning the management of property of this character, it is but just that those having the greater interest in value should be those to commence the proceedings and to propose the improvements to be made. Such improvements are not of a public character; they affect only the estates of those who are owners of the property; and the action which is to be taken relates only to that in which all have a common interest, or in reference to which all are affected by a common necessity. *Lowell* v. *Boston*, *ubi supra*.

This is analogous to the management of wharves and general fields by their proprietors, who are to vote in regard thereto according to the relative amount or value of their interest when known. Gen. Sts. *c.* 67, §§ 12, 24. Nor can it be fairly contended that, because the words "amount" and "value" are used in the statute last referred to in connection with the word "interest," and not in *c.* 148, a different construction is to be given to the latter statute. The word "interest" is itself sufficient to include value. *Exceptions sustained.**

* By the St. of 1876, *c.* 228, passed April 28, 1876, § 2, of the Gen. Sts. *c.* 148, is amended by adding the words "either in value or area," after the word "interest."

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WILLIAM MASON *vs.* LEWIS E. FIELD.

Bristol. Oct. 28, 1875. — March 2, 1876. MORTON & LORD, JJ., absent.

A., owning a building abutting upon lands owned severally by B. and C., made separate contracts with them conveying to each a part of his wall, with permission to build upon it as high as their buildings should require. B.'s and C.'s buildings were substantially one. B. agreed so to provide for carrying off the water from the roof of A.'s building where it abutted against his own, as to prevent any leakage in A.'s building. The contract with C. contained a similar stipulation on his part. *Held*, that B.'s agreement applied only to leakage in that part of A.'s roof that abutted on B.'s building; and, that part being properly constructed, that he was not liable for imperfection in the roof against C.'s part of the building.

A. and B., owning contiguous land and buildings, made a contract with regard to a building to be erected on B.'s land, wherein B. stipulated to remove the eaves and jet of A.'s building, and make good the roof, after removing the same where his building rose above A.'s wall, "in a thorough and workmanlike manner, without injury to the appearance or utility of the rest of the building, and provide in the most effectual manner, by a gutter, valley, flashing or otherwise, to permanently receive and carry off the water from the roof of A.'s building." B. made a new roof to a part of A.'s building for the purpose. *Held*, that he was justified in so doing under his contract, if that was the best method of carrying off the water, or as good as any other; and that this question was properly submitted to the jury.

A. and B., owners of adjacent lands and buildings, made a contract whereby B. agreed to make certain alterations in the roof of A.'s building where it abutted upon B. In an action by A. for a breach of this contract, he joined counts in tort, averring that they were for the same cause of action. *Held*, that under these counts A. could not show acts of B. done in regard to portions of A.'s roof not abutting on B.

CONTRACT for breach of a written agreement, with counts in tort, averred to be for the same cause of action. At the trial in the Superior Court, before *Aldrich*, J., the jury returned a verdict for the defendant, and the plaintiff alleged exceptions, the substance of which appears in the opinion of the court.

C. A. Reed, for the plaintiff.

G. Marston, for the defendant.

ENDICOTT, J. The plaintiff owned a building called Templar Hall, which was bounded on its eastern side fifty-three feet by land of Richmond, twenty feet by land of the defendant, and again twenty-five feet by land of Richmond; Richmond thus owning the northern and southern end of the adjoining land, and the defendant the intervening twenty feet. The defendant, intending to build on his twenty feet, entered into a con-

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tract with the plaintiff, which is the subject matter of this suit. By this contract the plaintiff conveyed to the defendant one undivided half part of the eastern wall of Templar Hall, from the ground to the roof, abutting on the twenty feet owned by the defendant. The contract contemplated the erection of a building by the defendant higher than the eastern wall of Templar Hall, and authorizes the defendant to build the wall as much higher as necessary for the completion of his building. And it provides that the defendant shall "remove the eaves and jet of said Templar Hall Building, and make good the roof after removing the same, where his proposed building rises above the present wall, in a thorough and workmanlike manner, without injury to the appearance or utility of the rest of the building; and provide in the most effectual manner, by a gutter, valley, flashing or otherwise, to permanently receive and carry off the water from the roof of the Templar Hall Building, where it abuts against his said building, so as to prevent any leakage in said Templar Hall Building by reason of rain, accumulation of snow, ice or otherwise, during the work and afterwards."

The intent of the parties in making this provision was evidently to prevent leakage in that part of the roof of Templar Hall which would abut against the proposed building of the defendant, and this is confirmed by other facts which appear in the bill of exceptions. The plaintiff had an agreement with Richmond like the one made with the defendant; from which it is to be inferred that both of them intended to build substantially one building, under similar agreements in relation to the work to be done on the land of each where it abutted against Templar Hall. It also appears that Richmond and the defendant erected the building against Templar Hall, but it did not appear at the trial that the defendant had anything to do with the portion erected on Richmond's land, or that Richmond had anything to do with the portion erected on the defendant's land.

The building thus constructed by Richmond and the defendant respectively was about six feet higher than the eastern wall of Templar Hall, and the wall was raised to that extent by both the defendant and Richmond, under their contracts. To carry off the water that would fall on the space covered by that side of the roof of Templar Hall, the defendant constructed against

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his twenty feet, and Richmond against the land owned by him, over the original slate roof of Templar Hall, a tin roof which sloped from the ridge of the hall to the new building. It was so constructed that the water falling on the tin roof, together with a portion of the water falling on both Richmond's and the defendant's parts of the new building, should be carried into a conducting pipe, and from that into the defendant's building, to be used there.

The plaintiff contended that the pipe was insufficient for the purpose, and that the water was discharged over the south end of the new roof against Richmond's part of the new building, and through imperfections in the south end of the new roof, between the old and new roof, there was a leakage into Templar Hall. And he asked a witness, "How was the south end (which was Richmond's part) of the addition in the roof of Templar Hall Building closed up?" This question was properly excluded; and the presiding judge rightly ruled that if the defendant had properly constructed the new roof against his twenty feet, he was not liable for improper construction in the roof against Richmond's part. And, in connection with the claim of the plaintiff that the capacity of the pipe was insufficient, he also properly ruled that the defendant was bound to provide for the discharge of all water falling on the new roof abreast of his part, under all usual circumstances of the climate, but was not so bound to provide for any extraordinary condition of things not be expected in this climate.

Nor do we see any objections to the ruling of the presiding judge that if the construction of the new roof over the old roof was the best method of carrying off the water, the defendant was justified in doing so under his contract. The contract provided for the erection of a new building higher than the eastern wall of Templar Hall, and the raising of the wall, and the defendant stipulated that he would provide "in the most effectual manner, by a gutter, valley, flashing or otherwise, to permanently carry off the water from the roof of the hall, where it abuts against his new building."

Whether the defendant had properly constructed the new roof, and whether that method of carrying off the water was the best method, or as good as any other, was submitted to the jury

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under instructions to which no exception was taken; and on those questions the jury found for the defendant.

The plaintiff called a witness, an expert in the business of slate and tin roofing, and among other things asked him what would be the effect of water or rain flooding up on the tin roof, but the judge, on objection by the defendant, excluded the inquiry as being matter of common knowledge, and not a subject for the evidence of experts. It is not necessary to consider the question whether the effect of water or rain flooding on a tin roof is a subject matter for the testimony of an expert. The portion of the tin roof which was affected by the flooding, and which admitted the water through imperfections in its construction, was not against the defendant's part of the building; and no claim is made that the roof leaked where it abutted on the defendant's part. The testimony, therefore, of the expert became immaterial, as it related to the action of water on that part of the roof abutting on Richmond's land, for the improper construction of which the defendant was not responsible.

It was clearly incompetent for the plaintiff, under his counts in tort, to show acts of the defendant "in respect to the portion of the new roof abreast of the land of Richmond," as he asserted the right to do. He had averred that the counts in tort and contract were for one and the same cause of action; otherwise they could not be joined. Gen. Sts. *c.* 129, § 2, *cl.* 5. As the count in contract can only apply to acts done or omitted in regard to that portion of Templar Hall abutting on the plaintiff's land, the count in tort is also limited to the same portion. When the plaintiff attempts to prove a tort not within that limit, he shows another cause of action, different from that set up in the count in contract. *Exceptions overruled.*

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DAVID HEALY *vs.* MATTHIAS PFAU.

Bristol. Oct. 29, 1875. — March 4, 1876. MORTON & LORD, JJ., absent.

A bond for a deed of land recited that the obligor had agreed to sell and convey to the obligee certain land, the same to be conveyed by a good and sufficient warranty deed, and that the obligee agreed to pay therefor $1142, of which $100 was to be paid in cash "upon the delivery of this bond for a deed," and the remainder by six notes bearing even date therewith, the principal to be paid $200 each year and interest according to the tenor and effect of the notes; and provided that it should be void, if the obligor should, "upon tender by the obligee of the said cash and notes, and at any time when said amount is paid from this date, deliver unto the said obligee a good and sufficient deed as aforesaid." The bond and notes were all of the same date, the $100 was duly paid, and the notes given. *Held*, in an action upon the first note after its maturity, and to recover interest upon the other notes, that the defendant was only entitled to the deed on payment of the notes at or before their maturity, and that the action could be maintained without a previous tender of a deed of the land by the obligor.

CONTRACT upon a promissory note for $200, dated Fall River, June 12, 1873, made by the defendant, payable to the plaintiff one year from date, with interest at the rate of eight per cent., payable semi-annually, and to recover interest upon five other similar notes, payable respectively in two, three, four, five and six years from the same date. Writ dated November 21, 1874. The case was submitted to the Superior Court, and, after judgment for the plaintiff for $272.47, to this court on appeal, on an agreed statement of facts in substance as follows:

The plaintiff sold a parcel of real estate to the defendant, and gave to the defendant the following bond for a deed, signed by him and dated June 12, 1873:

"Know all men by these presents, that I, David Healy of Fall River, county of Bristol, and State of Massachusetts, am holden and stand firmly bound unto Matthias Pfau, of said Fall River, in the sum of twenty-five hundred dollars, to the payment of which to the said obligee or his executors, administrators or assigns, I hereby bind myself, my heirs, executors and administrators.

"The condition of this obligation is such that, whereas the said obligor has agreed to sell and convey unto the said obligee a certain parcel of real estate situated in Fall River aforesaid, and bounded as follows, namely. [Then followed a description

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of the land.] The same to be conveyed by a good and sufficient warranty deed of the said obligor, conveying a good and clear title to the same, free from all incumbrances.

"And whereas, for such deed and conveyance, it is agreed that the said obligee shall pay the sum of eleven hundred and forty-two dollars, of which one hundred dollars are to be paid in cash upon the delivery of this bond for a deed, and the remainder by six notes of the said obligee, bearing interest at eight per cent. per annum, payable semi-annually, and bearing even date herewith, whereby the said obligee agrees to pay the said obligor said sum and interest. The principal to be paid, two hundred dollars each year, and interest as aforesaid, according to the tenor and effect of said notes.

"Now therefore, if the said obligor shall, upon tender by the said obligee of the aforesaid cash and notes, and at any time when said amount is paid from this date, deliver unto the said obligee a good and sufficient deed as aforesaid, then this obligation shall be void, otherwise it shall be and remain in full force and virtue."

The defendant gave the plaintiff for the said real estate one hundred dollars in money, and six promissory notes signed by him, but the plaintiff never gave or tendered to the defendant a deed of the land. The notes mentioned in the bond are the ones upon which the action is brought. The bond and notes were made at the same time, and the $100 was paid at or about the time of making the notes and bond.

If the court finds said action to be brought prematurely, and that a deed should have been tendered to the defendant before bringing said action, or that the consideration of said notes has failed, then judgment is to be for the defendant; otherwise for the plaintiff.

W. H. Peirce, for the plaintiff.

H. K. Braley, for the defendant.

AMES, J. The defendant insists that, by the terms of the bond, the plaintiff had no right of action upon the note declared upon, without having first delivered or tendered to the defendant a deed of the land which was the subject of the contract between the parties. It is not easy to give a sensible construction to an instrument so illiterate and obscure as the bond in which

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the parties have undertaken to set forth the terms of their contract. The bond given by one party, and the notes given and the payment made by the other, all were of the same date, and are agreed to have constituted one transaction. If the defendant is right in his claim that, upon the delivery of the notes and the payment of one hundred dollars, he was entitled to his deed, there was no occasion for a bond at all. In that view of the case, he had done all that he was required to do, in order to be entitled to the conveyance. He had bought the land on credit, and had given all the securities which he was required to give. Nothing remained for the plaintiff to do except to deliver the deed, and, having done so, to wait for the payment of the notes as they should come to maturity in regular succession. But the instrument is described on its face as a bond for a deed — a form of expression which imports that a deed is to be given at some future time, and that for some reason it is not to be delivered presently. We cannot give any sensible interpretation to the bond, or any rational explanation of the fact that it was given and accepted instead of a deed, except upon the assumption that the parties had it in contemplation that something remained to be done in the future, and that the delivery of the notes was not of itself to entitle the defendant to his deed. No deed was delivered by the plaintiff, and none was demanded or apparently expected by the defendant at that stage of their dealings; and there is no apparent reason why he should have taken a bond for a deed, if he had in fact fulfilled the conditions upon which he was to have a present and immediate right to the deed.

Our conclusion therefore is, that the true meaning of the instrument, however awkwardly and imperfectly expressed, must be that the defendant was to have a bond for a deed, until he should have paid the notes; and that whenever they were paid, whether at or before their maturity, it would be the duty of the plaintiff to execute the conveyance. *Exceptions overruled.*

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LOUM SNOW, JR. *vs.* UNION MUTUAL MARINE INSURANCE COMPANY.

Bristol. Oct. 27, 1875. — March 7, 1876. MORTON & LORD, JJ., absent.

The right to recover for a constructive total loss, on abandonment of a vessel to the underwriters, depends upon the state of facts when the abandonment is made; and the abandonment, if justified by those facts, relates back to the time of the loss.

If a vessel is once totally lost by a peril insured against, and the master, using due diligence, is unable to regain possession of her in such a condition and under such circumstances as to enable her to pursue the voyage for which she is insured, the right to abandon and to recover for a constructive total loss remains, without regard to the question whether at some future time, over which the master has no control, he might be able to regain possession of her on payment of salvage, and without regard to the proportion between the amount of the salvage and the value of the vessel.

In an action on a policy of marine insurance, there was evidence that the vessel insured, a whaling vessel, was jammed fast in the ice in the Arctic Ocean, with no open water in sight, and drifting northwards with the current; that her officers and crew, finding it impossible to extricate her with the utmost efforts, and being nearly worn out with fatigue and want of sleep, in order to save their lives, left her in their boats, taking with them their guns and whaling gear, and, by passing through narrow strips of water and hauling the boats over the ice, reached the whaling fleet in safety, fifty miles south of where they left the vessel; that ten days afterwards, the men, boats and guns being scattered in different vessels, and some of them having gone home, the ice loosened, and the abandoned vessel was got out by the master and crew of another vessel, and held for salvage; that the master of the vessel insured was not able, by the exercise of reasonable efforts, to obtain a sufficient crew or whaling craft, or to gain possession of the vessel to pursue the voyage on which she was employed, and for which she was insured; that the vessel was taken by the salvors to San Francisco, and before her arrival there was abandoned by her owners to the underwriters. *Held*, that it was competent for the jury to find a verdict against the underwriters for a constructive total loss.

Under a declaration on a policy of marine insurance for a total loss, a constructive total loss may be recovered.

It is not necessary, in a declaration on a policy of marine insurance, to allege the abandonment of the vessel to the underwriters, or the facts necessary to constitute the total loss relied on.

CONTRACT on a policy of insurance on the ship Helen Snow and outfits, "wherever she may go on a whaling voyage," from October 14, 1871, to October 14, 1875. The vessel was valued at $10,000, and the outfits at $20,000.

The declaration was as follows: "And the plaintiff says the defendant made to him a policy of insurance, a copy of which is hereto annexed, for the sum of eighteen hundred and seventy-

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five dollars, on bark Helen Snow, against the perils of the seas and other perils therein mentioned, on a whaling voyage during the time in said policy set forth; and while engaged upon said whaling voyage, the said bark was encompassed in heavy masses of ice in the Arctic Ocean, and so rendered unnavigable and at the mercy of the currents and the masses of ice around her, and in danger of immediate destruction by being crushed or set aground, with all her outfits, cargo and stores, so that the officers and crew for the safety of their lives were compelled to leave and abandon her, and seek safety in finding their way on the ice to some other ships or to the land, and so the said whaling voyage was utterly broken up and lost, and said ship and her outfits, cargo and stores were totally lost by the perils of the seas and perils insured against in said policy; and the defendant had due notice thereof, and became bound to pay the sum insured in said policy to the plaintiff, as provided in said policy, before the date of the writ in this case. And the defendant owes the plaintiff therefor said sum of eighteen hundred and seventy-five dollars and interest thereon, as for a total loss under said policy."

At the trial in this court, before *Wells*, J., it appeared that the vessel was left by the master and crew in the Arctic Ocean on August 21, 1872; that the vessel was abandoned to the underwriters on October 14, 1872, and on November 1, 1872, the vessel arrived at San Francisco in the possession of salvors. The plaintiff also put in evidence on which the judge directed that the following questions of fact should be submitted to the jury: "1. Whether the master, officers and crew of the Helen Snow were warranted, by necessity resulting from a peril insured against, in leaving the ship, as they did, on August 21, 1872. 2. Whether, up to the time of the written abandonments, the plaintiffs had an opportunity to resume possession of the ship, for the purpose of pursuing the voyage for which she was insured, of which they did not avail themselves."

The defendant contended that the evidence would not warrant the jury in answering these questions in favor of the plaintiff, and declined to go to the jury thereon, agreeing that if the jury would be waranted in finding these issues in favor of the plaintiff, the case should stand as if these issues had been so found. The plaintiff then asked the judge to rule that, upon

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these findings, he was entitled to recover a total loss. The judge declined so to rule.

The defendant objected that, under the declaration, no evidence of a constructive total loss would be admissible. The objection was overruled, and the case was reported for the consideration of the full court. If the findings for the plaintiff, upon the two issues submitted to the jury, would entitle him to a verdict for a total loss, then judgment was to be entered for the plaintiff for a total loss, if the court should also find that there was any evidence on which the jury might properly have found upon these issues for the plaintiff; otherwise, for the defendant, or the case to stand for trial, for proof of a partial or constructive total loss, if the action could be maintained under the declaration. Annexed to the report was a copy of the evidence in the case, the nature of which appears in the opinion.

G. Marston & C. W. Clifford, for the plaintiff.

T. M. Stetson, for the defendant, cited *Falkner* v. *Ritchie*, 2 M. & S. 290; *Parsons* v. *Scott*, 2 Taunt. 363; *Naylor* v. *Taylor*, 9 B. & C. 718; *Bainbridge* v. *Neilson*, 10 East, 329; *Thornely* v. *Hebson*, 2 B. & Ald. 513; *Underwood* v. *Robertson*, 4 Camp. 138; *Anderson* v. *Wallis*, 2 M. & S. 240; *Pole* v. *Fitzgerald*, Willes, 641; *Brotherston* v. *Barber*, 5 M. & S. 418; *Everth* v. *Smith*, 2 M. & S. 278; *Hunt* v. *Royal Exchange Assurance*, 5 M. & S. 47; *Wood* v. *Lincoln Ins. Co.* 6 Mass. 479; *Greene* v. *Pacific Ins. Co.* 9 Allen, 217.

GRAY, C. J. The evidence introduced at the trial would warrant the jury in finding that the Helen Snow, being jammed fast in the ice in the Arctic Ocean, with no open water in sight, and drifting northwards with the current, her officers and crew, finding it impossible to extricate her with the utmost efforts, and nearly worn out with fatigue and want of sleep, in order to save their lives, left her and took to the boats, bringing away the guns and whaling gear, and by passing through narrow strips of water, and hauling the boats over the ice for two or three days, reached the whaling fleet, fifty or sixty miles south of where they left the vessel; that the officers and crew, with the boats, guns and whaling gear, being scattered in other vessels, and some of them having gone homewards, ten days afterwards, by a change of the wind and currents, the ice loosened

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and the Helen Snow was brought out by the master and crew of another vessel, and held by them for salvage; and that the master of the Helen Snow, although he made reasonable efforts so to do, was not able to obtain a sufficient crew or whaling craft, or to regain possession of the vessel so as to pursue the voyage on which she was employed and for which she was insured, and she was brought by the salvors to San Francisco, and, before her arrival at that port, abandoned by her owners to the underwriters.

By our law, the right to recover for a constructive total loss, or abandonment to the underwriters, depends upon the state of facts when the abandonment is made; and the abandonment, if justified by those facts, relates back to the time of the loss. It is true that a loss of the voyage is not necessarily a loss of the ship, within the meaning of a policy of insurance upon her. But if the ship herself is once totally lost by a peril insured against, and the master, using due diligence, is unable to regain possession of her in such a condition and under such circumstances as to enable her to pursue the voyage for which she was insured, the right to abandon and to recover for a constructive total loss still remains, without regard to the question whether at some future time, over which the master has no control, he might be able to regain possession of her on payment of salvage, and without regard to the proportion between the amount of the salvage and the value of the vessel.

In the present case, the leaving of the vessel in the ice, made necessary by a peril insured against, was a constructive total loss, and would clearly have warranted an abandonment to the underwriters at any time before she was rescued. Her subsequent rescue by salvors, her master never having been able to resume possession of her so as to prosecute her voyage, did not cut down this total loss to a partial one, but there was still a constructive total loss of the vessel at the time of the abandonment to the underwriters.

The case is within the principle of *Greene* v. *Pacific Ins. Co.* 9 Allen, 217. See also *Peele* v. *Merchants' Ins. Co.* 3 Mason, 27, in which the principal English cases relied on by the defendant are fully considered and distinguished.

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The declaration alleges a total loss substantially in the form allowed by the practice act, as well as by the rules previously established by this court. Gen. Sts. p. 665. 24 Pick. 406. The allegation of a total loss, like the corresponding words in a policy of insurance, covers a constructive as well as an actual total loss. *Heebner* v. *Eagle Ins. Co.* 10 Gray, 131. It is not necessary, under our practice, to allege the abandonment or other facts necessary to constitute the total loss relied on.

The evidence at the trial being sufficient to prove a constructive total loss by the cause alleged in the declaration, it follows that, according to the terms of the report, there must be

Judgment for the plaintiff for a total loss.

BRIDGET HAWKINS *vs.* PROVIDENCE AND WORCESTER RAILROAD COMPANY.

Bristol. Oct. 28, 1875. — March 27, 1876. MORTON & LORD, JJ., absent.

Personal apparel furnished by a husband to his wife, or purchased by the wife, with the consent of her husband, with money given her by him from a fund formed by their joint earnings, remains the property of the husband, and the wife cannot maintain an action against a carrier for the loss thereof.

CONTRACT, with a count in tort, for the loss of certain articles of personal property, delivered to the defendant corporation for transportation from Worcester to Providence, the plaintiff being a passenger at the time.

At the trial in the Superior Court, before *Pitman*, J., it appeared in evidence, on the part of the plaintiff, that, prior to the bringing of this suit, she and her husband lived together as husband and wife; that she and her husband had worked in a mill, and that he had delivered to her from time to time his earnings, and that she had mingled with them her own earnings; that the articles mentioned in the declaration, and described therein as clothing suitable for her, were by her purchased and used for her personal apparel, by consent of her husband, with money given her by him from the fund formed

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by their joint earnings. The defendant asked the judge to direct a verdict for the defendant; the judge refused so to do, and the defendant excepted.

The defendant asked the judge to instruct the jury as follows:

"If the plaintiff purchased the goods with her husband's permission, and with his money, she cannot recover. If the plaintiff was earning money, and mixed it as earned and received with her husband's earnings, and from their joint earnings she, with his consent, purchased the property, she cannot recover.

"If a married woman, not having filed a certificate under the statutes, mingles her earnings with those of her husband, clothing purchased by her from the joint fund would be property of her husband."

The judge refused so to rule, and instructed the jury as follows: "If the wife purchased the articles with the husband's money, given her by him, or with her own money, or with money from a fund created by mingling the earnings of wife and husband, she would have such a title to these articles of her personal apparel as would enable her to recover their value in this action."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions to the refusal to rule as requested, and to the rulings given.

J. Hopkins, for the defendant.

B. K. Lovatt, for the plaintiff.

AMES, J. The statutes which from time to time have been enacted in this Commonwealth, for the purpose of enlarging the rights and privileges of married women, have not in terms made any specific regulations in regard to the ownership of their wearing apparel. Except in cases where the wife herself purchases it with her own separate money or earnings, that matter remains exactly as it stood at common law. At common law, the husband is bound to maintain the wife, and to provide her with suitable clothing appropriate to their degree and his own circumstances and social position. If the articles of clothing and personal ornament appropriate for her are purchased with his money or upon his credit, the fact that they are selected and purchased by her, and are intended for her personal and exclusive use, does not render them any the less his property. In

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this respect, the clothing of the wife comes under the same general rule as the clothing of the minor children in the same family. The provision of the Gen. Sts. *c.* 96, § 4, that "the articles of apparel and ornament of the widow and minor children of a deceased person shall belong to them respectively," furnishes a strong implication that, without such a provision, they would constitute a part of the assets of the deceased person's estate, and would be liable as such to be sold for the payment of his debts. It was to prevent the distress and inconvenience in this respect, which would result from the common law rule as to such property, that this statute regulation was found to be necessary. The provision of the Gen. Sts. *c.* 133, § 32, among the "articles of the debtor" exempt from attachment for his debts, includes the "necessary wearing apparel of himself and of his wife and children;" a provision which would be wholly unnecessary if these articles were not his property.

The property sued for in this action consists mainly of the plaintiff's personal clothing; and if it had been purchased by her with her own money, that is to say, with money which was literally her own, and belonged to herself separately and exclusively, the action in her name might well be maintained. But we find nothing in the facts reported to support that view of the case. On the contrary, we find that the relation in which she and her husband stood to each other was exactly the ordinary relation of husband and wife as it stood at common law, unaffected by any of the recent legislation upon that subject. It does not appear that she had any separate property of her own, or that she was following any trade or business of her own, requiring a certificate to be filed in pursuance of the St. of 1862, *c.* 198. She and her husband worked in the same mill, and under the St. of 1874, *c.* 184, § 1, the work and labor of a married woman shall be presumed to be on her separate account. Under that statute, therefore, she could have kept her earnings separate, if she saw fit to do so. But this is a privilege which she might waive, and her allowing them to be mingled with those of her husband would be *primâ facie* evidence that she had done so. *Kelly* v. *Drew*, 12 Allen, 107. The money with which she purchased the clothing described in the declaration appears from the bill of exceptions to have been given to her by her husband from

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a fund made up of her and his earnings. We see no ground on which we can say that this joint fund, or any part of it, was her separate property. She was the custodian, but did not thereby become exclusively the owner of it. And, as we must assume that this fund was used in paying the necessary expenses of the family, the presumption referred to in the statute last quoted is effectually rebutted. The husband was legally responsible for these expenses, and the fund was his property. The case does not resemble, as it is suggested by the plaintiff's counsel, the case of a wilful confusion of goods. The money given to her from that fund was her husband's money and not hers, intrusted to her as his agent, and, in pursuance of his legal obligation to support and clothe her, to be used in payment of articles which he was bound to supply, and which might properly be charged to him. There can be no valid gift of money or property by the husband to the wife. Gen. Sts. *c.* 108, § 10. *Thomson* v. *O'Sullivan*, 6 Allen, 303. *Baxter* v. *Knowles*, 12 Allen, 114. It would remain his property notwithstanding such gift.

In this view of the case, the instructions requested by the defendant should have been given, and those actually given were incorrect and inappropriate. *Exceptions sustained.*

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SUPPLEMENT.

THE Honorable THERON METCALF, a justice of this court from the twenty-fifth day of February, 1848, to the thirty-first day of August, 1865, died at his residence in Boston on the thirteenth day of November, 1875. A meeting of the members of the bar of the Commonwealth was held in Boston on the eighteenth, at which a resolution was passed, which was presented to the full court on the twenty-seventh by the Attorney General. Before presenting it the Attorney General addressed the court as follows:

May it please your Honors, — With your permission I desire to present a resolution, unanimously adopted at a meeting of the members of the bar of the Commonwealth, as the expression of their appreciation of the life, character and labors of the Honorable Theron Metcalf, late an associate justice of this court.

In the performance of this duty I can say nothing not already known to the court, nor can I improve upon the nice discrimination, just criticism and honest appreciation contained in the resolution.

Born in Franklin, in the county of Norfolk, on the sixteenth day of October, 1784, we know but little of his childhood and youth, save what was gained by an occasional playful remark from his own lips.

In 1801 we find him a member of the Freshman class in Brown University, then Rhode Island College, from which he graduated with honor. For his Alma Mater, Judge Metcalf always cherished a filial respect and love. Among his teachers were numbered the accomplished and eloquent Maxey, then President of the college; David Howell, one of the ablest constitutional lawyers in the Continental Congress; Calvin Park, father of the distinguished Professor Park of Andover; and John Reed, within

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our recollection a member of Congress and Lieutenant Governor of Massachusetts; and among his fellow students, Dr. Adoniram Judson, the distinguished Baptist missionary to Birmah; Dr. Benedict, the historian of the Baptists; Willard Preston, the first President of the University of Vermont; Governor Morton of our own state; Senator Allen; Judge Randall of Rhode Island; and John Whipple, since the leader of the Rhode Island Bar, always distinguished for its learning and ability; and Henry Wheaton, Envoy Extraordinary and Minister Plenipotentiary to Prussia, and the author of "Elements of International Law." Under such influences Mr. Metcalf developed the qualities which afterwards led to his distinction in his profession; and his efforts and success as a scholar are treasured with pride in the traditions of a University which has contributed its full share to the distinguished men of the Republic.

Leaving college, he at once entered upon his legal studies, and in 1808 he was admitted to the bar of the Court of Common Pleas. Three years afterwards, according to the rule then existing, he was admitted to the bar of this court.

In 1809 he established himself in Dedham, where he remained thirty years, devoting himself with untiring zeal and patient labor to the studies and duties of the profession, which he loved for itself rather than for those rewards to which its constant votaries are entitled. He held the office of County Attorney for twelve years, and until the office was abolished and that of District Attorney established. He was a member of the House of Representatives in the years 1831, 1833 and 1834, and of the Senate in 1835. In each of those years he was chairman of the committee on the judiciary. In 1839 he was appointed Reporter of the decisions of this court, which position he filled until he was appointed to the bench in February, 1848, where he remained until his resignation August 31, 1865.

Amid the labors and duties of his professional life he found time to assist the profession and contribute to the science of the law, and his editions of Yelverton's Reports, of Starkie on Evidence, Russell on Crimes, and Maule and Selwyn's Reports, beside numerous contributions to the leading legal and literary reviews and periodicals of the country, attest his accurate learning and ripe scholarship. As one of the commissioners in 1835 to

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supervise the publication of the Revised Statutes, the index to which was his own and a model of its kind; in his share in the preparation of the first volume of the United States Digest; in his Digest of a part of the Massachusetts Reports, and his Supplements to the Revised Statutes from 1836 to 1844, he made the profession and the Commonwealth largely his debtors. In 1867 he published a work entitled "Principles of the Law of Contracts, with examples of their application," which consists of ten articles originally contributed to the American Jurist, commencing in October, 1838. These articles attracted great attention in the legal profession and were unanimously commended.

I have thus hastily sketched his life and labors, that the record may show how he had compacted his life with usefulness, and how absorbingly he gave himself up to purely professional labors.

Born directly after the adoption of the Constitution, he seems to me perhaps the last of the men of eminence who connected us personally with the founders of the state. He had lived and walked and talked with Parsons and Sewall and Parker and Fisher Ames, and, like them, was fully imbued with the spirit of the common law, had made himself familiar with all its sources and master of its principles. It has been said of him, by one competent to give the opinion, that he was one of the greatest masters of the learning of the English common law which the American Bar has produced. Modest and self-depreciating to a fault, he was ever just to parties, able, patient and courteous to counsel, and, if not as distinguished as others have been as a nisi prius judge, his learning, his industry and his patience rendered him of the utmost value to his associates in bank and in the consultation room.

His life to us is a lesson of industry, energy and self denial; its results will reach far down the tides of time, long after the memory of him and his labors shall have passed away from the traditions of men; but he will be remembered by us and our contemporaries, in the language of Chief Justice Redfield, from whom I have already quoted, as "the model reporter, the learned, able and pure-minded judge, the unexceptionable law-writer, the accomplished scholar, the good citizen, the faithful friend, the earnest and devout and courteous Christian gentleman."

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The Attorney General then presented the following resolution:

The members of the bar of the Commonwealth, called together by the death of the most aged of our number who has held judicial office, desire not so much to express a sense of immediate loss, for we know that he had passed beyond the time for useful labor, as to bear our testimony to the great services which Theron Metcalf rendered the science of jurisprudence, to the simplicity of his character, the courtesy and kindness of his manners, the fidelity with which he discharged every public duty, and his almost unique devotion of a long life to the profession of his choice.

While the traditions of his courtesy, geniality and quaint humor, of his patience, indefatigable labor, tenacious memory and deep affection for all that concerned the learning or administration of jurisprudence, may not survive so long as we could wish, we are confident that he has established, by his labors as an author and a judge, in his treatises, annotations and judicial opinions, a reputation that will not pass away. We believe that other generations of lawyers will recognize and admire, as we have, the rectitude of his judgment, the clearness and directness of his intellectual processes, the unusual terseness and purity of his style, and the entire trustworthiness of his statements.

We hope that younger men whose professional courses, mental habits and modes of expression are yet to be formed, will respect the wisdom which selected a profession to which his talents and faculties were well adapted; the fidelity which gave to it the single-minded labor of a lifetime; the conscientiousness which, claiming no public reward, received promotion only from the general sense of his fitness for the posts assigned him; keep before them his clearness, conciseness and purity of expression; and duly honor a life which has made jurisprudence its debtor.

We request the Attorney General to present this resolution to the Justices of the Supreme Judicial Court for the Commonwealth, at its present session, and to ask them to enter upon its records this tribute of respect to their late associate.

Chief Justice GRAY responded as follows:

Gentlemen of the Bar: The court heartily joins in your tribute of respect to one who was in so many ways a teacher of the present bench and bar of the Commonwealth in the rules and principles of the common law.

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Judge Metcalf was an excellent common lawyer. I doubt whether those who hear me have ever known a better. His deep and accurate knowledge was the result of the training of a clear intellect by years of unwearying study and much thought. Early in his professional life, he collected a nearly complete library of the old reports and commentaries, and, as he once admitted to me, read them all; and his notes and references in the volumes themselves mark how careful and thorough his reading was. His acquaintance with the sages of the law was so familiar and intimate, that he had imbued himself, not only with their wisdom and learning, but with their spirit, and almost seemed one of them, in mastery of legal principles and rules of pleading, in pith and compactness of phrase, and in quaint humor. Even in personal aspect, as we remember him, he recalled the frontispiece of a folio of Croke or Hobart.

The evidence of his legal knowledge and attainments, as well as of his sense of the duty which every man owes to his profession, is patent to all — in the records of his arguments at the bar, beginning more than a hundred volumes back in the series of our reports; his annotations of Yelverton, published in 1820, of which forty years afterwards he would say in private that he was not ashamed, but which he shrank from hearing cited by his own name; his editions of English text books, of which it is sufficient to mention Starkie on Evidence, in which he doubled the number of authorities referred to; his Essay on Contracts in the American Jurist; the first volume of the United States Digest, which, if he had completed the five volumes, might well have taken the same place in our law as that of Chief Baron Comyns in the law of England; his reports of decisions of this court, which have been the model and the despair of his successors; and his judicial opinions during the seventeen years that he held a seat upon this bench, which are unsurpassed for purity of style and clearness and exactness of expression.

Of his knowledge of those branches of jurisprudence, to which, judged by his own standard, he had not paid special attention, his modesty sometimes led him to speak so slightingly, as to mislead those who received his words literally, while, to those who knew him better, it seemed to border on affectation. His learned argument in the leading case in this Commonwealth on the sub-

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ject of foreign laws, reported in the ninth volume of Pickering, shows that it was from the civilians that he obtained his favorite maxim, *Juris ignorantia est si* JUS NOSTRUM *ignoramus*.

Outside of the law, his reading was confined to the classics and the best old English authors. His kindly temper and manner, his shrewd observation, his wonderful memory, his dry wit and fund of unrecorded anecdote, made him a most entertaining companion to those of every age. But he was peculiarly accessible and cordial to his juniors in the profession. For myself, I gladly take this occasion to testify that, from the time I was a student at law, to that of meeting him in the consultation room of the judges, I was constantly indebted to him for friendly advice and valuable instruction.

We do not mourn for him as for one stricken down in the midst of his usefulness; for we knew that his means of communicating with earthly friends were failing, and that he was at the end of his pilgrimage, on the very bank of the river, waiting, in Christian faith and hope, for the summons from the Celestial City.

As a sign that the memory and the example of Theron Metcalf are duly honored in the profession to which he devoted his life, it is ordered, in accordance with the request of the bar, that their resolution, together with a memorandum of these proceedings, be entered upon the records of the court.

The court then adjourned.

The Honorable JOHN WELLS, a justice of this court from the twenty-second day of September, 1866, died at Salem on the twenty-third day of November, 1875. A meeting of the members of the bar of the Commonwealth was held in Boston on the following day, and an adjourned meeting on the fourth day of December, 1875, at which resolutions were passed, which were presented to the full court the same day, by the Attorney General. Before presenting them the Attorney General addressed the court as follows:

May it please your Honors, — I am, in behalf of my associates, to present to you this morning their tribute of honor and respect

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to the memory of his Honor John Wells, so recently your associate upon the bench of this court.

I perform this duty with a heart bowed down by no common sorrow, as we all are painfully conscious that we have suffered no common loss, and I wish, as briefly as I may, to add my tribute of esteem and love to those already heaped on his newly made grave.

I will not speak of him in terms of elaborate criticism or analysis, for that is far better done in the resolutions than I can do it, nor in terms of eulogy even, but in the language of friendship and affection.

I have no respect for those who indulge in censorious criticism of a public man when living, and indiscriminate eulogy when dead. I have often thought, when I have heard elaborate praise accorded to such a man after death, how a tithe of this language, in the living ears of the departed, would have encouraged him in the performance of duty, have cheered and prolonged his life, and have been to him a reward, added to that which follows the self-consciousness of faithful service.

Judge Wells was one of those rare men, who needed neither the spur of ill tempered criticism, nor of indulgent compliment, to keep him steady in the performance of duty. His mental and moral organization was so evenly balanced and well perfected, that censure did not retard, nor compliment hasten, the pulsations of his heart. He realized, at the outset of his life, that he had responsibilities to bear, and a purpose to fulfil, and he marched steadily on to its fulfilment.

I first knew him thirty-four years ago, in the Law School of the University, where, under the guidance of Story and Greenleaf, he laid the foundations of the superstructure which he subsequently raised. From that time to his death, I was honored by his friendship, and have watched his progress from young manhood to middle age, and the only change noticeable in him, as he advanced through the years, was a continual ripening, day by day. He was the same John Wells through all those years, thoughtful, conscientious, patient of labor, making all that could be made out of his opportunities, apparently ambitious only to discharge faithfully his duty in that station of life to which God had called him, and thus preserve the approval of his own con-

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science, which he never intrusted to the keeping of another. Neither then, nor since, am I aware of his ever saying, or doing a brilliant thing, and never, to my knowledge, was he guilty of a foolish act, or silly utterance, but he moved right on, with that steady, self-poised and well-determined action, which attracts no attention, until its results are accomplished.

As a lawyer in the country village which he had selected for his home, you find in him no noisy or cunning pettifogger, seeking to profit in pocket or reputation by the disputes of the people; no stirrer up of strifes, but one who remembered that the peacemakers are blessed. You find him the diligent student, the safe adviser, the kind neighbor, the efficient member of the parish, the active and Christian citizen, rendering cheerfully to the community every good influence and kind act.

A few years later, he is in the General Court, exerting a commanding influence, as a sound, safe and discreet legislator.

As Judge of the Probate Court, that most difficult office to fill, where the incumbent must be judge, counsel and sympathizing friend at one and the same time, as well as by his well earned reputation as a lawyer, he demonstrated his mental, professional and moral fitness for the duties and responsibilities of a judge of this, the highest judicial tribunal of the state, to which he was appointed, I believe, upon the unanimous recommendation of the bar of Western Massachusetts. The wisdom of their recommendation, upon his appointment to the bench, was conceded at once upon acquaintance by the bar of the Commonwealth, and his judicial career proved that he had no superior, where all should be equals.

He entered upon and performed his judicial duties in the profound conviction that there were no duties or responsibilities surpassing those of a Judge of the Supreme Judicial Court; that God required, and the office demanded, the highest integrity in morals, and in professional culture, united with patient labor, gentle courtesy and unwearied attention, and, acting upon this, no suitor ever left Judge Wells's court room, whether successful or not, with the impression that his case had not received, at the hands of the court, all the consideration to which it was entitled.

In his court room, every one felt that he was in a place "appropriated to justice, to security, to reason, to restraint; where

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there is no respect of persons; where there is no high nor low, no strong nor weak; where will is nothing, and person is nothing, and numbers are nothing, and all are equal, and all secure before the law."

Judge Wells was no judicial demagogue; he acted upon the sentiment of the German poet: "The human being may not be trusted to self-government. The clear and written law, the deep trod footmarks of ancient custom, are all necessary to keep him in the road of faith and duty."

He followed precedents, but only as his mind discovered and approved the principles on which they were founded, and his opinions, the result of patient study, prolonged thought and severe logic, had placed him at the close of his life — alas! for the Commonwealth too early — among the foremost of the men who have adorned the bench of this court, and guided and illustrated its jurisprudence. Had it been in the providence of God that so valuable a life should be prolonged, it is no injustice to his surviving associates to say that no judicial life in this Commonwealth ever gave a more promising assurance for the future.

The corner-stone upon which the reputation of Judge Wells rested as a man, a lawyer and a judge, was his Christian character, vindicated by his love to God and to his neighbor, consistent always, forgetful never. He realized that here in his high office, he was a ruler, as well as lawgiver, and he was never unmindful of the injunction of the prophet of the Lord, "He that ruleth over men must be just, ruling in the fear of God."

Mr. Chief Justice, our friend and your associate is dead, cut off by an inscrutable Providence in the midst of his ripening usefulness. The bar of Massachusetts can only tender to his heart stricken wife and family, and to the court, the assurance of their profound sympathy, and the hope, "that in the good providence of God, time, the healer, will come to them, as it comes to all, and that what is now a bitter anguish will come to be a chastened sorrow," and that his memory shall be unto all of us "as the light of the morning, when the sun riseth, even a morning without clouds; as the tender grass springing out of the earth by clear shining after rain."

May it please your Honors, in compliance with the wishes of the bar, I move that the resolutions now presented may be entered upon the records of the court.

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The Attorney General then presented the following resolutions:

Resolved, That the death of Judge Wells, Senior Associate Justice of the Supreme Judicial Court, in the meridian of life and the full maturity of all his powers, is a calamity which will long be felt by the bar and the people of this Commonwealth; that his acute, philosophical intellect, his legal learning, adequate in all and preëminent in many departments of jurisprudence, his habits of thorough and minute investigation, his remarkable power of protracted study and patient thought, his anxious conscientiousness and unfailing devotion to duty, his absolute intellectual and moral independence and impartiality, made him a pillar of strength in our judicial system; while his native modesty, the ornament of a meek and quiet spirit, the gentleness and courtesy of his manners, his simplicity, innocence and purity of heart and life, endeared him to all who came within the sphere of his influence.

Resolved, That we tender our respectful sympathy to the widow and children of our deceased brother, congratulating them that in their irreparable loss they have the precious consolation of the memory of a life and character in which there is nothing they could wish to have changed.

Resolved, That the Attorney General be desired to present these resolutions to the Supreme Judicial Court, with a request that they be entered on its records, and that the secretary transmit a copy thereof to the family of the deceased.

Chief Justice GRAY responded as follows:

Gentlemen of the Bar: The sense of the loss which we have sustained in the death of Mr. Justice Wells is too fresh and too deep for elaborate eulogy of him.

He was of that type of character to which New England owes most. From his youth up, trusting in the power and goodness of God, obedient to conscience, faithful to every duty, self-controlled and self-forgetful, modest, fearless, patient, straightforward, inflexibly just, more interested in moral questions than in romance or poetry, grave and reserved in demeanor, but kind and courteous to all, and warmly attached to his household, his friends, his neighbors, his state and his country.

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He was a republican, in the truest and best sense; believing in popular government, as known to him through the traditions of Massachusetts and his own experience; and ever ready to accept an opportunity of serving his fellow-citizens, in the parish and Sunday school, in associations for purposes of charity or education, in town or county offices, in the Legislature of the Commonwealth, or in conventions of the people for political or religious objects.

Born in one of the hill towns of Franklin county, practising his profession in the valley of the Connecticut, early associations and his own peaceful nature made the busy hum of cities or the grandeur of the wilderness less attractive to him than a quiet homestead amid orchards and green fields. When the exigencies of his judicial office induced him to remove to this neighborhood, he for a time lived in Boston. But he cannot be said to have taken root here. He was happier after he had built himself a house on a site of his own choice in the adjoining town of Brookline, where he could sometimes, as of old, when the labors of the day were over, join his townsmen in town meeting.

At the time of his appointment to this bench (little more than nine years ago) some of us had had opportunities of observing his learning and acuteness in the argument of questions of law, and the weight that his character and open dealing gave him with juries. We knew that his uprightness and ability had placed him at the head of the bar of his county; that his wise and paternal administration of the office of Judge of Probate had endeared him to many; and that he had the confidence of the people of his section of the state to such a degree as would be a support of any court of which he was a member. But we hardly anticipated his breadth of view, or his capacity of grappling with new problems of jurisprudence. Nor did we then understand, as has since been made manifest, how truly he was one

> "Who, not content that former worth stand fast,
> Looks forward, persevering to the last,
> From well to better, daily self-surpast."

You have attested, brethren, the sagacity and firmness, the untiring patience, the simple dignity and courtesy, with which he presided at jury trials or hearings in chancery. Some of his

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opinions upon questions of equity and real property, and of constitutional law, have already taken their place with the great judgments of his predecessors. But his judicial qualities were nowhere more conspicuous than in the consultation room. His minute and accurate observation of the facts, his thoughtful comparison of the arguments, his careful weighing and scrutiny of precedents, his nice appreciation of legal distinctions, his grasp of fundamental principles, his strength in presenting his own suggestions, and his candor in considering those of his associates — guided throughout by a love of justice, and tempered by common sense — made his presence a peculiar safeguard. In arriving at results that would affect the rights of his fellow-men, no detail was so small as to be neglected, no field of investigation too wide to be explored. Very cautious in forming his conclusions, he was correspondingly tenacious of them when formed. He always wished the opinions of the court to be placed upon such grounds as, not going beyond what the decision of each case required, should afford a firm foothold in determining future controversies. Speaking for each of the judges as for myself, I can truly say that every year of association with him brought a greater reliance upon his counsel and a closer friendship.

The impression made by his death is not confined to the profession of which he was one of the most honored and beloved members. From every part of the Commonwealth — from the western counties, in which he was born and educated, and passed his early manhood; from Suffolk, in which the greatest part of his judicial work was done; from Norfolk, in which was the home of his adoption, and Essex, in which he died — have gone up voices of mourning and of blessing for the wise and just judge, the useful citizen, the kind neighbor, the true friend.

As we vainly strive to express our estimate of his worth, better words echo in our ears and come to our lips: "He did justly, he loved mercy, he walked humbly with his God." "The path of the just is as the shining light, that shineth more and more unto the perfect day."

Brethren, the duties, which we hoped he would have shared and lightened, rest upon his survivors. It is not for us to murmur because He who doeth all things well has called him to his

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reward; but, thankful for his companionship, inspirited by his example, to close up the ranks and move onward.

In accordance with the request of the bar, their resolutions, together with a memorandum of these proceedings, will be entered upon the records of the court.

The court then adjourned.

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INDEX.

ABANDONMENT.

See INSURANCE, 9–13.

ABATEMENT.

See COMPLAINT, 3.

ACTION.

1. In an action against a town for an injury sustained by a defect in a highway, the mere fact that the injury was sustained while the plaintiff was attempting to pass in his carriage another carriage travelling in the same direction, in violation of a statute, does not as matter of law defeat the action, if his own fault or negligence did not contribute to the injury; but it is competent evidence of negligence on his part to be submitted to the jury. *Damon* v. *Scituate*, 66.
2. In an action to recover for injuries caused by the collision of the plaintiff's carriage with that of the defendant, the fact that the plaintiff was at the time driving at a rate of speed prohibited by a city ordinance does not, as matter of law, defeat the action, if his own fault or negligence did not contribute to the injury; but it is competent evidence of negligence on his part to be submitted to the jury. *Hall* v. *Ripley*, 135.
3. An action of tort cannot be maintained against a town for the acts of its assessors and collectors in assessing and levying a poll tax upon a person not an inhabitant thereof, even if the assessors act with integrity and fidelity and are therefore by the Gen. Sts. *c.* 11, § 51, not themselves liable to an action. *Alger* v. *Easton*, 77.
4. A party to a contract, who agrees for a specified price to convey a good and clear title to a parcel of land, free from all incumbrances, except a mortgage of three and three fourth cents per square foot, cannot maintain an action at law upon the contract for the refusal of the other party, who has agreed to buy the land on these terms, to complete the purchase, if it appears that the land is subject to a mortgage of four and one quarter cents per square foot, although he tenders with the deed the difference in money between the incumbrance mentioned in the agreement and that existing. *Brigham* v. *Townsend*, 287.

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5. After judgment for the conversion of certain chattels, an action cannot be maintained for the conversion of other chattels taken by the same act, but accidentally omitted in the former action. *Folsom* v. *Clemence*, 473.

See COVENANT, 2, 3; EXECUTOR AND ADMINISTRATOR; PLEADING, I. WAY, 10, 11, 14.

ADMINISTRATOR.

See EXECUTOR AND ADMINISTRATOR.

ADVERSE POSSESSION.

1. There is sufficient privity of estate between a testator, a person to whom he has devised land for life and the remainderman under his will, to establish a title by adverse possession, if the possession by the testator and his devisees is continuous for twenty years. *Haynes* v. *Boardman*, 414.

2. The mere payment of rent or admission of title by a tenant, without the knowledge of his landlord, will not operate to interrupt an otherwise continuous adverse possession by the landlord. *Ib.*

AGENT.

See PRINCIPAL AND AGENT.

AGREEMENT.

See CONTRACT.

AMICUS CURIÆ.

See EXCEPTIONS, 1, 2.

APPEAL.

1. The "attested copy" of the reasons of appeal filed in the probate office, which is required by the Gen. Sts. *c.* 117, § 10, to be served on the adverse party, must be attested by the register of probate; and the service of a copy, attested by the attorney of the appellant, is not a compliance with the statute. *Wait* v. *Demeritt*, 158.

2. An order of the Superior Court, setting aside the verdict of a sheriff's jury, is a final disposition of the case so far as that court is concerned, and any question of law involved in the order may be brought at once to this court by exceptions or appeal. *Rose* v. *Taunton*, 99.

3. Irregularity in the proceedings upon a complaint in a District or Municipal Court is no ground for dismissing the complaint on appeal. *Commonwealth* v. *Holmes*, 195. *Commonwealth* v. *Fredericks*, 199.

4. If a criminal case has been brought by appeal from a Municipal Court to the Superior Court, and the complaint is sufficient upon its face to authorize a verdict and judgment upon it in the Superior Court, a misrecital of the complaint in the record of the Municipal Court furnishes no ground for dismissing the complaint. *Commonwealth* v. *Malloy*, 347.

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5. At the trial, on appeal from a District Court, of a complaint for a sale of intoxicating liquors, in which the prosecution enters a *nolle prosequi* as to all the offences charged except one, and a conviction is had upon that one, the presumption, in the absence of evidence to the contrary, is that the conviction in the District Court was for the same offence. *Commonwealth* v. *Holmes*, 195.

6. At the trial, on appeal from a Police Court, of a complaint for a sale of intoxicating liquor to a person unknown, if the evidence corresponds with the allegation of the complaint, the jury may, in the absence of proof to the contrary, presume the offence proved to be the same as that of which the defendant was convicted in the Police Court. *Commonwealth* v. *Fields*, 105.

ARBITRAMENT AND AWARD.

1. The question of the position of the boundary line of adjacent parcels of land cannot be submitted to arbitration under the Gen. Sts. *c.* 147, § 1. *Torrey* v. *Munroe*, 490.

2. An award by arbitrators under the Gen. Sts. *c.* 147, determining a boundary line, cannot be enforced by judgment of the Superior Court under § 10 of that chapter. *Ib.*

3. An award under the Gen. Sts. *c.* 147, was properly inclosed and sealed up by the arbitrator and transmitted to the court by the hands of the counsel of the party in whose favor it was made, who deposited it unopened with the papers in an action of contract brought upon it. It appeared that the award was not opened by the clerk of the court, nor by either counsel, and it did not appear by whom it was opened. There was subsequently found among the papers in the suit one purporting to be an award by the same arbitrator between the same parties, opened, without envelope or wrapper, or aught to show when or by whom it had been opened or filed. The Superior Court held that the award had not been so returned, filed and opened, as to warrant its acceptance or recommitment; and that there was not any award before the court. *Held*, on a bill of exceptions setting forth the above facts, that there was nothing to show that the judge erred in holding that the Gen. Sts. *c.* 147, § 8, had not been complied with. *Curley* v. *Chadburne*, 489.

ARSON.

See EVIDENCE, 12; EXCEPTIONS, 18.

ASSAULT.

1. Where two persons go out to fight with their fists, by consent, and do fight with each other, each is guilty of an assault, although there is no anger or mutual ill will. *Commonwealth* v. *Collberg*, 350.

2. On the trial of an indictment for an assault with a dangerous weapon, to wit, with a knife, there was evidence that the assault was with a jack-knife. The judge ruled that a jack-knife, like that exhibited to the jury, was a dangerous weapon. *Held*, on a bill of exceptions, which did not

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more particularly describe the knife, that the court could not say as matter of law that the instruction was erroneous. *Commonwealth* v. *O'Brien*, 342.

See EXCEPTIONS, 17; MALICIOUS PROSECUTION, 1.

ASSENT.

See EVIDENCE, 19; LAW AND FACT, 2; MASTER AND SERVANT, 3.

ASSESSMENT.

See COVENANT, 1; INSURANCE, 3–5.

ASSIGNMENT.

See PLEADING, 1; TRUSTEE PROCESS, 5, 6.

ATTACHMENT.

1. Tobacco stored in barns, hanging on poles in process of curing and in such condition that it cannot be moved without great damage to it, is subject to attachment. *Cheshire National Bank* v. *Jewett*, 241.
2. Under the Gen. Sts. *c.* 123, § 57, providing that in the attachment of articles of personal estate, which "by reason of their bulk or other cause cannot be immediately removed," a certified copy of the writ and the return may be filed within three days in the office of the city or town clerk, it is sufficient if the property cannot be removed without great damage to it. *Ib.*
3. Tobacco in the process of curing, and in such condition that it could not be removed without great damage to it, was attached under the Gen. Sts. *c.* 123, § 57, and afterwards, at the time when it required to be stripped and packed, was stripped and packed by the defendant in boxes so that it could be transported without injury. No arrangement was made between the defendant and the attaching officer in regard to the stripping and packing, and the officer did not see the tobacco until after it was packed, when he locked up the boxes containing it in a building upon the defendant's premises. The defendant afterwards mortgaged it to a person who had no knowledge of the attachment. The key to the building was kept by the officer for several months, and then given to the defendant's assignee in bankruptcy to enable him to examine the property, and by him lent to the defendant for a special purpose, without the knowledge of the officer. The mortgagee afterwards took possession and placed a keeper in charge of the property, from whom and against whose protest it was taken by the officer. *Held*, that there was no such misconduct or neglect shown on the part of the plaintiff or the officer as would dissolve the attachment. *Ib.*

See BANKRUPT, 2; EVIDENCE, 21; MORTGAGE, 3; STATUTE, 2.

ATTORNEY.

See CERTIORARI, 1; EXCEPTIONS, 19.

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AWARD.

See ARBITRAMENT AND AWARD.

BAIL.

A commissioner to take bail in criminal cases may require a written statement under oath from the bail, although the case does not come within the provisions of the St. of 1862, *c.* 159. *Commonwealth* v. *Butland*, 317.

BANKRUPT.

1. The jurisdiction of a state court over an action by an assignee in bankruptcy against a person, to whom the bankrupt has made a fraudulent preference, is not excluded by the bankrupt act, U. S. St. of 1867, *c.* 176, or by the U. S. St. of 1874, *c.* 390, § 2. *Goodrich* v. *Wilson*, 429.
2. Under the bankrupt act, U. S. St. of 1867, *c.* 176, § 21; U. S. Rev. Sts. § 5106, a plaintiff having a valid attachment upon the property of a defendant, who, pending the action, but not within four months after the attachment was made, has instituted proceedings in bankruptcy, is not entitled to a special judgment, to be enforced only against the attached property, until the question of the debtor's discharge is determined, if there is no unreasonable delay on the part of the defendant in endeavoring to obtain his discharge. *Ray* v. *Wight*, 426.
3. In an action by an assignee in bankruptcy to recover the value of personal property upon the ground that it was transferred to the defendant in fraud of the bankrupt act, it appeared that, more than four months before the filing of the petition in bankruptcy, two of the creditors of the bankrupt brought suits against him and attached the property in question, which was placed by the officer in the charge of the defendant, who receipted therefor in the usual form. The bankrupt afterwards executed a bill of sale of the attached property to the defendant, who sold a part of it and applied the proceeds to the satisfaction of the executions in the suits of the attaching creditors. The jury were instructed that if the arrangement between the defendant and the bankrupt was to the effect that the property should be sold and the proceeds applied towards the payment of the debts of the attaching creditors, without regard to attachments, and without a demand perfected in execution, that would be a preference, and in that case the defendant could claim no protection under the attachments; but if the understanding and intent was that the proceeds of the property should be held by the defendant as security against his liability on his receipts and applied on the debts only upon demand duly made on execution, and the sales were in good faith and the proceeds in fact applied on the executions, the defendant could claim protection under the attachments, unless it appeared that the parties intended a preference, or a fraud to prevent the property from distribution under the bankrupt act. *Held*, that the instruction was sufficiently favorable to the plaintiff, and that he had no ground of exception. *Parsons* v *Topliff*, 245.

See EVIDENCE, 3, 25; EXCEPTIONS, 19; FRAUDULENT CONVEYANCE; STATUTE, 2.

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BASTARDY PROCESS.

1. A supplementary complaint filed in the Superior Court, in a bastardy proceeding, need not be sworn to. *Sabins* v. *Jones*, 167.

2. Evidence is not admissible, in a bastardy proceeding, that the complainant had criminal intercourse with men, other than the respondent, more than twelve months before the birth of her child. *Ib.*

3. A person charged under the bastardy act with being the father of a bastard child, executed a bond, payable to the plaintiff, conditioned that he should appear at the next term of the Superior Court, answer to the complaint, and abide the order of the court thereon. The defendant duly appeared and answered, and was defaulted at the trial. *Held*, that there was a breach of the bond. *Tracy* v. *Howe*, 228.

4. If the sureties, on a bond given by the respondent on a complaint under the bastardy act for his appearance in the Superior Court, and to abide the order of the court thereon, surrender their principal in the Superior Court, that court has no authority under the Gen. Sts. *c.* 72, §§ 4, 5, to order the respondent to be committed to abide the further order of the court, but only to order him to give a new bond and to stand committed until he complies with that order. *Hanlan's Case*, 59.

See DEPOSITION; DISTRICT COURT.

BETTERMENT.

See CERTIORARI, 2–4; WAY, 3, 6, 7.

BILL OF EXCHANGE.

A draft headed "New England Agency of the Pennsylvania Fire Insurance Company," having the words "Foster & Cole, General Agents for the New England States" printed in the margin, and appearing on its face to be drawn upon said insurance company in payment of a claim against it, is the draft of the company, and not of Foster & Cole, although it is signed by them in their own names. *Chipman* v. *Foster*, 189.

BOND.

1. A bond purporting in its body to be executed by J. S., "as principal and —— —— as sureties," and signed by the principal and A., is good against A. as surety, if duly executed by the principal, and it does not appear that A., at the time of executing it, understood that it was to be executed by any other person as surety. *Danker* v. *Atwood*, 146.

2. The surety upon a bail bond is liable in *scire facias* thereon, if the writ upon which the principal was arrested is identified by a date, the court, the full name of the plaintiff, and the surname of the defendant, although his Christian name, as expressed in the bond, was not inserted in the writ. *Ib.*

3. A bond for a deed of land recited that the obligor had agreed to sell and convey to the obligee certain land, the same to be conveyed by a good and sufficient warranty deed, and that the obligee agreed to pay therefore $1142

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of which $100 was to be paid in cash "upon the delivery of this bond for a deed," and the remainder by six notes bearing even date therewith, the principal to be paid $200 each year and interest according to the tenor and effect of the notes; and provided that it should be void, if the obligor should, "upon tender by the obligee of the said cash and notes, and at any time when said amount is paid from this date, deliver unto the said obligee a good and sufficient deed as aforesaid." The bond and notes were all of the same date, the $100 was duly paid, and the notes given. *Held*, in an action upon the first note after its maturity, and to recover interest upon the other notes, that the defendant was only entitled to the deed on payment of the notes at or before their maturity, and that the action could be maintained without a previous tender of a deed of the land by the obligor *Healy* v. *Pfau*, 589.

See BASTARDY PROCESS, 3, 4; STATUTE, 2.

BOND OF INDEMNITY.

See PROMISSORY NOTE, 4.

BOOK ACCOUNT.

See EVIDENCE, 30.

BOUNDARY.

See ARBITRAMENT AND AWARD, 1, 2; DEED, 10, 11.

BROKER.

See EXCEPTIONS, 20.

BURDEN OF PROOF.

See EVIDENCE, 1, 2; FRAUDULENT CONVEYANCE; MARRIED WOMAN, 1; PROMISSORY NOTE, 2; WAY, 14.

BY-LAW.

See SALE.

CARRIER.

See HUSBAND AND WIFE.

CERTIORARI.

1. On a petition for a writ of certiorari to bring up and quash the proceedings of an inferior tribunal, an answer of the tribunal containing allegations and denials of fact, and signed by counsel, is irregular. *Chase* v. *Aldermen of Springfield*, 556.
2. It is no ground for a writ of certiorari to quash the proceedings of a tribunal, authorized to assess betterments for the laying out of a highway, that the records of the tribunal do not show that a grade line was established *Ib.*

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3. A petition for a writ of certiorari to quash the proceedings of a tribunal of a city assessing a betterment tax on an estate for the laying out of a highway, under the St. of 1871, *c.* 382, alleged that the proceedings were void because it did not appear that the amount assessed was a proportional part of the expense of laying out and grading the street. The answer alleged that it sufficiently appeared by the records that the expense of laying out and grading the street was largely in excess of the amount assessed by the tribunal, and that the amount so assessed was a proportional part of said expense. The answer also alleged that, in fact, said expense was largely in excess of the amount assessed, and said amount was a proportional part of said expense. The record annexed to the petition showed an adjudication that the whole amount of benefit and advantage received by any real estate from the laying out of the street, beyond the general advantage to all real estate in the city, was $31,050, one half of which, viz.: $15,525, should be assessed upon the lots of land specially benefited, in proportion to the benefit and advantage received by each. By consent of the parties, the case was reserved for this court upon the petition and answer and a report of a single justice, which stated that the records did not show the actual expense of laying out and constructing the road, or that the amount assessed upon the lands benefited was a proportional part of said expense; but that, if it could be shown in this way, it could be proved by the books of public record of the city, and by parol, that the actual expense of laying out and constructing the road was between $21,000 and $22,000, and that the assessment of betterments was a proportional part of about two thirds of that sum. *Held*, that, although the record was defective in not showing the amount of the expense, yet that defect could be cured by an amendment of the record, and, upon the allegations in the answer, the agreement of the parties as to the effect thereof, and the facts found at the hearing, afforded no ground for a writ of certiorari to issue. *Chase* v. *Aldermen of Springfield*, 556.

4. An order of the proper tribunal of a city, laying a betterment tax under the St. of 1871, *c.* 382, directed the tax collector to collect said assessment, with interest at twelve per cent. per annum. *Held*, on a petition for a writ of certiorari, which did not assign the order to collect interest as one of the errors, that the validity of the order laying the assessment was not affected thereby. *Ib.*

See ERROR, 2; GRAND JURY, 4.

CHARITY.

1. A gift for the erection of a house for public worship, or for the use of the ministry, may constitute a public charity, if there is no definite body, for whose use the gift was intended, capable of receiving, holding and using it in the manner intended. But when there is a body, or a definite number of persons, ascertained or ascertainable clearly pointed out by the terms of the gift to receive, control and enjoy its benefits, it is not a public charity, however carefully and exclusively the trust may be restricted to religious uses alone. *Old South Society* v. *Crocker*, 1.

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2 In 1669, land was conveyed to certain persons named "and to such as they shall associate to themselves, their heirs and successors forever, for the erection of a house for their assembling themselves together publicly to worship God, as also the erection of a dwelling-house for such minister or ministers as shall be by them and their successors from time to time orderly and regularly admitted, for the pastor or teacher to the said church or assembly, and for the accommodation of the said dwelling-house for the use of the minister or ministers as shall from time to time be chosen as aforesaid, and for the accommodation of the meeting-house, with convenient passages of ingress, egress and regress for the people, that shall there from time to time assemble as aforesaid, and for no other intent, use or purpose whatsoever." In 1677, the same grantor, by a deed reciting the preceding conveyance and the building of a meeting-house on the land by the grantees, conveyed an adjoining piece of land to the six survivors of the persons named in the preceding deed, "and to such as they shall have associated unto them in church fellowship, or shall be associated to them and to their heirs and successors forever, for the ends and purposes in the first above mentioned deed is fully and amply declared," "with the house already erected thereon for the use of their ministers or ministry orderly chosen by the said society, being the Third Church of Christ in Boston, from time to time and at all times forever." Both of these deeds were for a voluntary consideration. Subsequently, the grantor by her will gave to the "Third Church of Christ in Boston" her dwelling-house which adjoined the land before conveyed, "for the use of the ministry in the said church successively forever." The deeds and other writings concerning said house were by the will bequeathed to two of the persons named in the preceding deeds, as trustees for the said church, "for the end and use before declared." In 1845, the proprietors of pews in the church and their successors were made a corporation and authorized to take and hold, to the use of the corporation and its successors and assigns in fee simple, the property held by the church, "for the support of public worship, for parochial and charitable purposes in this Commonwealth, and for paying the debts of said corporation." *Held*, that neither the deeds nor the will created a public charity. *Held*, *also*, that the declaration of uses in the statute did not define a public charity, and that it was not the intention of the Legislature to so merge the interests of the trustees and the *cestuis que trust* as to discharge the estate from the trusts. *Held*, *also*, that lands so held might be sold by authority of the Legislature or of this court as a court of equity. *Held*, *also*, on a bill in equity praying for the sale of the property, and the application of the proceeds to the same trusts in another part of the city, that the vote of a majority of pewholders or members of the society was not of itself a sufficient authority to enable the corporation to make a sale, nor a sufficient reason to justify this court in authorizing it to be made; and that it was incumbent upon those who sought to make the change to satisfy the court that it was reasonably required for the accommodation of the society as a whole, and that the proposed change would not subject the minority to an unreasonable sacrifice of interest or

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convenience, or in any way work injustice to them. *Old South Society* v. *Crocker*, 1.

3. A bequest to a town in trust, directing the town to appoint some suitable person or persons to receive and invest the fund, and annually at the annual town meeting to appoint some suitable person or persons to collect the income of the fund, and annually, at such time as the town shall direct, to pay over the same to such of the aged and infirm native-born inhabitants of the town, and maiden ladies who are native-born inhabitants of the town, although they be not aged, as shall be deemed by him or them most needy, and to each one such a sum as he or they shall think most just and equitable, and providing that no part of the said income shall be paid to any person who is receiving support as a pauper, is a valid charitable bequest under the laws of this Commonwealth. *Fellows* v. *Miner*, 541.

4. A charitable bequest in trust by a resident of this Commonwealth to a town in another state is not void because the town, at the time the bequest is made, is incapable, under the laws of that state, of taking the trust; and the fund may be ordered to be paid over to the town upon its being enabled, by a subsequent act of the Legislature of the other state, to administer the trust according to the will. *Ib.*

5. A testator living in this Commonwealth, and having property here, devised it to a town in New York in trust for charitable uses, directing the town annually to appoint at its annual town meeting some person or persons to administer the trust. The town being then incapable under the laws of New York of taking the trust, an act was passed by the Legislature of that state empowering the town to receive and hold the property in trust, and authorizing the supervisor and justices of the peace of the town to appoint one or more suitable persons to receive the property and administer the trust. *Held*, that such administration by persons appointed in the manner provided by the act would not be according to the will of the testator; but that, if the Legislature of New York should, within a reasonable time, provide by supplemental statute for the administration of the trust according to the will, the fund might be ordered to be paid to the town. *Ib.*

CHARTER PARTY.

See EVIDENCE, 2; SHIP, 2.

CITY.

See CERTIORARI, 3, 4; FLATS; TRUSTEE PROCESS, 1; WAY.

CODICIL.

See DEVISE AND LEGACY, 2, 4.

COMMISSIONER TO TAKE BAIL.

See BAIL.

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COMPLAINT.

1. A complaint which alleges that the defendant "unlawfully did expose and keep for sale intoxicating liquors," with intent to sell the same in this Commonwealth, charges but one offence. *Commonwealth* v. *Curran*, 206.

2. A complaint on the St. of 1875, *c.* 99, which charges the defendant with unlawfully selling intoxicating liquor, "not being then and there authorized to sell the same in said Commonwealth under the provisions of" that chapter, "or by any legal authority whatever," sufficiently negatives all authority of the defendant to sell intoxicating liquors, whether derived from the statute or from any other source. *Commonwealth* v. *Fredericks*, 199.

3. The misnomer, in a complaint, of the defendant, which is not apparent on the record, cannot be availed of by motion to dismiss, but only by plea in abatement. *Ib.*

4. The record of the judgment of a Municipal Court, transmitted to the Superior Court on appeal, stated that A. was brought before the court on the complaint of B. setting forth that A. was guilty of the crime of unlawfully selling intoxicating liquors, ("as is more fully set forth in said complaint.") Annexed to the record of the judgment was a copy of the complaint, both papers being signed by the name of the clerk of the Municipal Court, with the addition of the word "Clerk," and both being attested by him as true copies. *Held*, that no error appeared upon the papers. *Ib.*

5. A complaint under the Gen. Sts. *c.* 163, § 11, which alleges that the defendant at a time and place named "with force and arms did forcibly rescue and take out of the lawful custody of said complainant the body of one A., he the said A. being then and there a prisoner arrested by and held in the lawful custody of said complainant, upon the charge of a certain offence, to wit: the crime of drunkenness, and being a disturber of the peace, he the said complainant being then and there a police officer of said city, and being then and there duly authorized to arrest and hold in custody the said A. upon the charge aforesaid," is sufficient without alleging that the defendant knew that A. was in custody. *Commonwealth* v. *Malloy*, 347.

See APPEAL, 3–6; BASTARDY PROCESS, 1; DISTRICT COURT; FISHERY, 1.

COMPOSITION.

1. The creditors of A. and B. by a composition deed agreed to accept from A. and B. "ten per cent. of the amounts due us and each of us from said A. and said A. and B. in full settlement and discharge of our debts against them, said ten per cent. to be paid within thirty days." The plaintiff, one of A's creditors who joined in the deed, held a note and account against him, which were then due. He also held another note, which would not become due until after the expiration of said thirty days, on which A.'s name appeared as indorser. *Held*, that this last note was not included in the composition deed. *Hamblen* v. *Ratigan*, 153.

2. A., holding a promissory note of which B. was the maker and C. the indorser, signed a composition deed whereby the creditors of B. released

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all claim against him, the deed to be null and void unless signed by all his creditors, and wrote after his name the words, "provided this does not release the indorser in any manner." In an action against B. by another creditor, who had signed the deed, C.'s name did not appear among the signers of the deed; but it was agreed that if the signing by A. did not release the indorser, then all the creditors had signed. *Held*, that the condition annexed by A. to his signature was equivalent to a reservation of his rights against C., and did not prevent his execution of the deed from operating as a release of all his rights against B.; and that the deed was a bar to the action. *Richardson* v. *Pierce*, 165.

8. In an action by the payee against the maker upon a promissory note, there was evidence that, before the making of the note, the plaintiff agreed to take thirty-five per cent. of his debt and sign a composition deed, and that he afterwards deposited his claim with an attorney, to whom the defendant, induced by fear of an attachment of his property, paid a part of the whole claim in cash, and the rest by the note in suit; that the plaintiff afterwards signed a composition deed, by which the creditors agreed to take thirty-five per cent. of their claims, which was signed by "substantially all" the creditors, and was to be void unless the compromise was paid within seven days after the date of the deed. The plaintiff's signature to the deed was affixed after the expiration of the seven days, and his signature preceded those of a majority of the creditors who signed. The presiding judge instructed the jury that if, after the plaintiff agreed to sign with other creditors of the defendant the deed of composition, the plaintiff's attorney, by threats of an attachment, collected of the defendant in cash a sum equal to or larger than the sum agreed in the deed to be taken in discharge, and obtained the note declared on and delivered it to the plaintiff, who in consideration that he had thus received the full amount of his debt, affixed his signature to the deed, the jury would be warranted in finding that the note was without consideration; that if there was no relation between the plaintiff's signing the deed and the giving the note, and if this was an independent contract for the payment of the defendant's debt to the plaintiff, irrespective of any promise to sign the same and of the act of signing, the note was for a good consideration. *Held*, that the evidence justified the jury in finding that the note was signed upon the understanding that the deed should be signed. *Held*, *also*, that the instruction was correct. *Held*, *also*, that the validity of the consideration was to be tested by the object with which the contract was entered into, and not by the number of persons actually deceived by the plaintiff's signature. *Harvey* v. *Hunt*, 279.

9. An agreement of creditors "to accept seventy-five per cent. of the amount of indebtedness as set against our respective names; said seventy-five per cent. to be paid in two, four and six months, from December 15," the contract to take effect "provided all merchandise indebtedness accept the same settlement," is an agreement on the part of a creditor, who has sold the debtor merchandise, to compromise the whole claim set against his name, and rests upon sufficient consideration. *Farrington* v. *Hodgdon*, 453.

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5. Creditors signed an agreement "to accept seventy-five per cent. of the amount of indebtedness as set against our respective names; said seventy-five per cent. to be paid in two, four and six months, from December 15,' the contract to take effect "provided all merchandise indebtedness accept the same settlement." A., one of the creditors, held three notes of the debtor, two of which he had previously sold, taken back under false representations by the purchaser, and at the time he signed the above agreement was, with the knowledge of the debtor, endeavoring to force the purchaser to take the notes back, which was done before December 15. *Held*, in an action by A. upon the note not sold, that A. not being in possession or having control of the two notes sold, the debtor was not obliged as to them to tender the settlement notes. *Held, also*, as to the note in suit, that the debtor was not obliged to tender a settlement note of seventy-five per cent. on that note after the transfer of the other two notes, which the debtor had paid to the purchaser. *Held, also*, that evidence of conversations, tending to show the understanding of parties as to the notes sold, prior to the execution of the agreement, was not admissible to vary the written contract. *Farrington* v. *Hodgdon*, 453.

COMPROMISE.

See MONEY PAID.

CONFESSION.

See EVIDENCE, 23.

CONFLICT OF LAWS.

See CHARITY, 4, 5.

CONSTABLE.

Service of notice of intention to take the poor debtor's oath was made by a person who had been duly appointed and qualified as a constable of the city of Boston, and had held the office for several consecutive years, but the term of whose appointment had expired at the time of service. He was generally known as a constable, and at the time was notoriously acting as such, having an office in Boston, on the door of which was his name, with the addition "constable." The debtor delivered the notice to him, believing him to be a constable. *Held*, that he was an officer *de facto*, and that the validity of the service could not be collaterally called in question, in an action on the recognizance given by the poor debtor. *Petersilea* v. *Stone*, 465.

CONSTITUTIONAL LAW.

The St. of 1875, *c.* 99, authorizing the granting of licenses by the municipal authorities to sell spirituous and intoxicating liquors, and requiring the payment of a fee or excise therefor, is constitutional. *Commonwealth* v. *Fredericks*, 199.

See DIVORCE, 1.

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CONTRACT.

I. *Making.*

1. A contract signed by several persons, whereby "the undersigned" propose that if the other party to the contract will do a certain thing, "we will undertake" to do a certain other thing, is a joint contract on the part of the signers. *New Haven & Northampton Co.* v. *Hayden*, 361.

2. In an action to recover the value of one half of a party wall erected by the plaintiff partly on his estate and partly on that of the defendant, the jury may, in the absence of an express agreement as to payment on the defendant's part, infer a promise to pay, if the plaintiff undertook and completed the wall with the expectation that the defendant would pay him for it, and the defendant had reason to know that the plaintiff was so acting with that expectation, and allowed him so to act without objection. *Day* v. *Caton*, 513.

See COMPOSITION, 3; INSURANCE, 1; LAW AND FACT, 2; MASTER AND SERVANT, 3; SHIP, 2.

II. *Consideration.*

See COMPOSITION, 3; EVIDENCE, 19.

III. *Validity.*

See MARRIED WOMAN, 2.

IV. *Construction.*

3. The acceptance by a grantee of a deed of land containing a clause stating that it is subject to a mortgage "which the grantee hereby assumes and agrees to pay with the interest now due thereon," constitutes a contract by the grantee not merely to indemnify the grantor, but to pay the debt, if it be the debt of the grantor. *Furnas* v. *Durgin*, 500.

4. A promise to pay the debt of the promisee, no time being specified, is a promise to pay it when due, or forthwith if it is already due. *Ib.*

5. A. and B., the owners of adjoining lands, entered into an indenture under seal, whereby either was to have the right to build a party wall one half on the land of each. The indenture also provided that "the adjoining party may at any time use as much of the wall as he may choose for the erection of any building, but before he or they may use any or all of said wall, he shall pay the other party an appraised value of so much of said wall as he shall thus use." At the time the contract was entered into, B. had a building, one story high, on his land, with three sides of brick and the fourth side of wood, resting, by permission, on A.'s land. B. took down the wooden side of his building, and A. built the wall four stories high, leaving spaces for the timbers of B.'s building, and B. adjusted the timbers into these spaces, and so fitted his building and used the party wall, but did not otherwise use it. *Held*, in an action by A. against B. to recover for the value of the wall so used, that B. had not used the wall in the erection of

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any building, and that the action could not be maintained. *Shaw* v. *Hitchcock*, 254.

8. A., owning a building abutting upon lands owned severally by B. and C., made separate contracts with them conveying to each a part of his wall, with permission to build upon it as high as their buildings should require. B.'s and C.'s buildings were substantially one. B. agreed so to provide for carrying off the water from the roof of A.'s building where it abutted against his own, as to prevent any leakage in A.'s building. The contract with C. contained a similar stipulation on his part. *Held*, that B.'s agreement applied only to leakage in that part of A.'s roof that abutted on B.'s building; and, that part being properly constructed, that he was not liable for imperfection in the roof against C.'s part of the building. *Mason* v. *Field*, 585.

7. A. and B., owning contiguous land and buildings, made a contract with regard to a building to be erected on B.'s land, wherein B. stipulated to remove the eaves and jet of A.'s building, and make good the roof, after removing the same where his building rose above A.'s wall, "in a thorough and workmanlike manner, without injury to the appearance or utility of the rest of the building, and provide in the most effectual manner, by a gutter, valley, flashing or otherwise, to permanently receive and carry off the water from the roof of A.'s building." B. made a new roof to a part of A.'s building for the purpose. *Held*, that he was justified in so doing under his contract, if that was the best method of carrying off the water, or as good as any other; and that this question was properly submitted to the jury. *Ib.*

See ACTION, 4; BOND, 3.

V. *Performance and Breach.*

8. The plaintiff bought certain stock of the defendant at a price named. The plaintiff and defendant entered into an agreement in writing, by which, in consideration of the purchase, the defendant agreed to pay to the plaintiff, at the expiration of three years from the date of the agreement, all loss he might sustain in consequence of the purchase, including ten per cent. interest on the price paid, and the plaintiff agreed to pay to a third person one fourth of all profits he might receive from dividend or sale of the stock, deducting ten per cent. interest on the cost of the stock. *Held*, that there could be no breach of the agreement until the expiration of the three years; that the defendant was liable to the plaintiff at the end of the three years for loss sustained by him in consequence of depreciation in the value of the stock up to that time; and that the plaintiff was not required to sell the stock to determine its value, which could be proved by other modes. *Belcher* v. *Loveland*, 539.

9. A. and B., members of a firm, assigned a patent right to C. and D., and by a contract, made the same day with C. alone, agreed that, if C. should become dissatisfied with the purchase within a certain time, they would repurchase of him the patent right and repay him the amount paid therefor, provided he should give them notice thereof within a certain time. In an

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action on this contract by C. against the firm, it appeared that C. became dissatisfied and gave the defendants notice thereof, requiring them to repurchase. The plaintiff testified that, within the time agreed, he asked A. what he would do about the contract, who said he would try to get another member of the firm to help the plaintiff out of it, and that, after the action was brought, the one, with whom the conversation was had, refused to repurchase. The plaintiff also testified that, after the expiration of the time stated in the contract, but before the action was begun, he had a conversation with B., who said he could do nothing about the repurchase, as he was too poor to raise money. The judge ruled that there was not sufficient evidence of a refusal to repurchase on the part of A. to warrant the jury in finding a waiver of a tender of a deed, and that the refusal of B., on the ground of his poverty, did not bind A., directed a verdict for A. and reported the case to this court, a new trial to be ordered if the ruling was incorrect. *Held*, that there was evidence sufficient to warrant the jury in finding that the defendants had refused to perform the contract; that the ruling was incorrect, and that a new trial must be granted. *Rider* v. *Pease*, 492.

See EVIDENCE, 4, 6; LAW AND FACT, 1; MASTER AND SERVANT, 2.

CORPORATION.

Under the Gen. Sts. *c.* 68, § 35, authorizing this court "for reasonable cause" to "decree a dissolution of" a corporation, upon a petition by a "majority in number or interest of the members," it is no ground for the dissolution of a telegraph company that it leased its line to another company at a less rent than it might have obtained, fraudulently intending to give the benefit of the lease to the second company, in which the majority in interest of the stockholders of the first company were also interested, if, after the filing of the petition for dissolution, the lease is cancelled by vote of the directors of both companies. *In re Franklin Telegraph Co.* 447.

See CHARITY, 5; EVIDENCE, 11; MASTER AND SERVANT; TRUSTEE PROCESS, 3, 4.

COSTS.

1. The provision of the Gen. Sts. *c.* 156, § 27, that in the taxation of costs "the plaintiff shall be allowed only one term fee if the defendant is defaulted without having appeared," does not apply when the defendant is defaulted on the main issue, and avails himself of the right reserved to him by the Gen. Sts. *c.* 133, §§ 2, 3, of being heard upon the assessment of damages, and of moving that such assessment be made by a jury. *Galligan* v. *Clark*, 83.

2. A. brought an action against B. and attached personal property. A. was then sued by a creditor, and B. summoned as trustee. Both actions were returnable to and entered at the same term. B. was adjudged a trustee, and paid on execution to A.'s creditor the full amount due from B. to A. Afterwards, during the same term, judgment was ordered for the plaintiff

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for his costs, in the action of A. against B., and the clerk taxed the costs down to the time of such judgment, including the fees for keeping the attached property after payment by the trustee. *Held*, under the Gen. Sts. c. 142, § 20, that the taxation of costs was correct. *United States Manuf. Co.* v. *Clarke*, 163.

See WAY, 5.

COUNTY COMMISSIONERS.

See RAILROAD.

COVENANT.

1. Under the Gen. Sts. c. 48, § 5, providing that assessments for sewers and drains shall constitute a lien on the real estate assessed "for one year after they are laid," an assessment by the mayor and aldermen of a city of the expenses of laying a sewer in a street of the city upon land abutting thereon and benefited thereby, is an incumbrance thereon from the time of the order for its construction, and is a breach of the covenant against incumbrances in a deed of the premises delivered after such order, but before the assessment was laid. *Carr* v. *Dooley*, 294.
2. An entry upon a mortgaged estate, upon breach of condition for foreclosure, is, without actual ouster, an eviction for which a warrantee can recover upon his covenant. *Furnas* v. *Durgin*, 500.
3. The certificate of an entry upon a mortgaged estate to foreclose the mortgage under the Gen. Sts. c. 140, § 2, duly recorded, is sufficient evidence of eviction to sustain an action for a breach of a covenant of warranty. *Ib.*
4. Upon an action for breach of covenant of warranty upon the eviction of the warrantee by an entry of the mortgagee for foreclosure, the measure of damages is the amount of the mortgage debt and interest, if that is less than the full value of the estate. *Ib.*

See DEED, 1, 7.

CUSTOM.

See EXCEPTIONS, 20; SHIP, 2.

DAMAGES.

1. Upon an action upon a promise to pay a debt of the promisee, brought after it is due, but before any payment by the promisee, the measure of the damages is the amount of the debt and interest. *Furnas* v. *Durgin*, 500.
2. On the trial of a petition under the St. of 1871, c. 382, § 7, by the lessee of a part of a building, for the assessment of damages occasioned by the taking of the land on which the building stood, by a city to widen a street, the jury were instructed in substance that the value of the lease was its market value; that market value meant the fair value of the property as between one who wanted to buy and one who wanted to sell, irrespectively of peculiar circumstances rendering the lease of greater value to the lessee

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or of a desire on his part to retain the premises. No special objection was taken to this instruction, but the petitioner requested the further instruction that in determining the value of the lease the jury were to consider, among other things, the amounts which persons desiring to take the lease would be willing to give therefor, not excluding the amounts which the petitioner himself would give. The judge stated that he had no objection to giving this instruction with the modification, "if the petitioner is in the market for the lease." *Held*, that the petitioner had no ground of exception to the refusal of the judge to give the instruction without the modification. *Held*, *also*, that the petitioner had no ground of exception to the refusal of the judge to instruct the jury, as requested by him, that the statute entitled all persons whose property was taken for public uses, to receive damages for the value thereof, that the term "market value" was not used in the statute, and that the lessee was entitled to compensation for any value the property might have other than a market value. *Lawrence* v. *Boston*, 126.

See CONTRACT, 8; COVENANT, 4; DEED, 13; EVIDENCE, 16, 17, 22; LEASE, 3; WAY, 2–4, 8.

DEED.

1. Upon an action of contract against a grantor for a breach of the covenant of warranty in a deed which contained a release by his wife of her right of dower and homestead, there was evidence that the deed was signed by the wife before the description of the land or any other writing had been made in the deed, and that she never saw it afterward, and did not redeliver it after the description and the other parts had been written in. *Held*, that this did not invalidate the deed as against the grantor. *Furnas* v. *Durgin*, 500.

2. On the trial of a writ of entry, the demandant claimed title to the land in question as part of a lot conveyed by A. to B., and by B. conveyed to him. At the time of each of these conveyances, the land demanded was separated from the rest of the land conveyed by a substantial fence extending across the rear of the lot. The tenant's dwelling-house stood upon it, and there was no fence between it and the tenant's adjoining lot in the rear, but the whole was used as one house lot in the exclusive and actual possession of the tenant, which was adverse, under a claim of title, open and notorious. The title which A. had in the premises was acquired by quitclaim deed from the tenant and by the foreclosure of a mortgage while in his hands, which had been assigned to him. At the time of the quitclaim deed, A. gave possession of the premises to the tenant under an agreement of purchase, which was soon given up, and possession was taken by A. of all except the strip of land in dispute. The mortgage was foreclosed before A.'s deed to B. *Held*, assuming that the deeds included in their descriptions the land in question, that the grantors in those deeds were disseised, and that nothing passed by them. *Johnson* v. *Bean*, 271.

3. Land was conveyed by metes and bounds with a reservation to the grantor of a right of way over the granted premises, and a mortgage of the land was given back to the grantor, in which the land was described by the same

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metes and bounds as in the deed, and as "being the same premises conveyed thereby, this mortgage being a part of the same transaction." The land was sold by the mortgagee for breach of condition under the power of sale in the mortgage, and was described in the deed to the purchaser by the same metes and bounds, and as being the same described in the mortgage. No reservation was made or incumbrance mentioned in the mortgagee's published notice of sale. *Held*, that the last named deed did not convey the right reserved to the grantor in the original deed. *Walsh* v. *Macomber*, 73.

4. A reservation in a deed of land, that no building is to be erected by the grantee, his heirs or assigns, upon the land conveyed, creates an easement, or a servitude in the nature of an easement, upon the land; and the situation of the land relatively to other land of the grantor may be considered in determining whether such easement or servitude is a personal right of the grantor or is appurtenant to his other land. *Peck* v. *Conway*, 546.

5. Parties deriving title under a recorded deed have constructive notice of it provisions; and it is immaterial that they have no actual knowledge thereof. *Ib.*

6. A., the owner of a large lot of land, conveyed a portion of it to B., with the reservation in the deed "that no building is to be erected by the said B., his heirs or assigns, upon the land herein conveyed." A. retained the rest of the lot as his homestead, and owned no other land in the vicinity; and afterwards sold the homestead lot to C. by a deed describing the land by metes and bounds, but making no mention of the reservation in the deed to B., or of privileges and appurtenances. B. afterwards sold to D. by a deed making no reference to the reservation, and D. had no knowledge thereof. All the deeds were duly recorded. *Held*, that it was to be inferred that A. and B. intended to create an easement on the granted land for the benefit of A.'s adjoining estate; that this easement passed as appurtenant to the land by the conveyance to C.; and that he could maintain a bill in equity to prevent D. from building on his land, although a proposed building would do no appreciable injury to C.'s land. *Ib.*

7. The defendant owned a tract of land and conveyed it by a deed embracing in its description the whole width of a road, called a town road, running along the east side of the premises, its east side being made the east side of the land conveyed. The deed contained a covenant that the premises described were free from all incumbrances, except the aforesaid road, so far as the same was not discontinued. The town had previously voted, while the defendant owned the land, to discontinue a portion of the road bounding on the land conveyed. *Held*, in an action for breach of the covenants of warranty and against incumbrances, contained in the deed, that the deed conveyed the fee of the town road subject to the public easement. *Held*, *also*, that whatever private right of way certain persons had in the portion of the land, subject to the public easement, was merged in the public way, and that, as such right did not appear to have been acquired before the way was laid out, it could not be revived on its abandonment. *Leonard* v. *Adams*, 366.

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8. Land was sold bounded on a private way belonging to the grantor. No way was then laid out, though a culvert was built by the grantor across a piece of the land retained by him and a fence erected. A plan of the land showing a way had been previously recorded in the registry of deeds, but the deed made no reference to the plan. *Held*, that the plan did not control, and that the location of the way was a matter of fact, in determining which the conduct and declarations of the parties, the nature and position of the fence and culvert, and the purposes for which they were built were competent evidence. *Crafts* v. *Judson*, 521.

9. The owner of a large tract of land fronting on a road, through which land an open space of irregular width, varying from forty-eight to fifty-three feet, bounded on the sides by trees, fences and buildings, extended from the road back to other lands of the grantor, and was used for access to these lands, conveyed one of them by a deed containing the following clause following the description in the deed: "I hereby covenant, for myself, my heirs and assigns, that a carriage way at least twenty-five feet wide shall forever hereafter be kept open and unobstructed from said lot easterly to" the said road. In an action of tort by the grantee of the lot for the obstruction of the way, the defendant did not deny that the plaintiff was entitled, under this clause, to an unobstructed way at least twenty-five feet wide, but contended that no location of the way had ever been made under it, and asked the judge to rule that if a way twenty-five feet wide had since his occupation been always left open, he was entitled to a verdict. The judge declined so to instruct the jury, and instructed them that if, when the deed was given, a carriage way defined by visible objects had been previously located by the grantor, they might find that such way was intended to be secured to the grantee, although it was forty-five feet wide. *Held*, that this instruction gave the defendant good ground of exception. *Stetson* v. *Curtis*, 266.

10. A grant of land bounded by a way conveys the soil to the centre line of the way, unless a different intention appears by the other parts of the deed, or by the character of the locality to which the description is to be applied. *Motley* v. *Sargent*, 231.

11. Land was conveyed bounded northerly on a street, seven feet four inches; easterly on another street, thirty-five feet four inches; southerly on the land of C., seventeen feet five inches; and "westerly on a passage way," thirty-four feet ten inches, "or however otherwise bounded, with the buildings thereon standing, and the free use and privilege of said passage way in common with myself, my heirs and assigns forever, reserving to myself, my heirs and assigns forever, a mutual privilege in the well and pump standing at the northwesterly corner of the above described land." By the same deed the grantor conveyed his interest in a strip of land adjoining the north end of the land above described, which had been taken by the town to widen the street. By a plan afterwards prepared, the accuracy of which was not questioned, the northerly line varied from that given in the deed, the southerly line of the lot was only fifteen feet three inches, excluding the passage way, and the passage way at that point was four feet wide. *Held* that the grantee took to the middle of the passage way. *Ib.*

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12. A deed, in which the land conveyed is bounded upon a private way, estops the grantor and those claiming under him to deny the existence of the way for its entire length, as then actually laid out, or clearly indicated and prescribed. *Tobey* v. *Taunton*, 404.

13. At the time of a conveyance to A. of land in a city, bounded in the deed by a street, the grantor was the owner of the street. It was then used as a street and its boundaries were marked out and defined by rows of trees and fences, which boundaries included a portion of the land afterwards conveyed by the same grantor to B., and situated at the corner of the street. On a petition by B. for the assessment of damages for the taking by the city of a portion of the land conveyed to him, for laying out the street, the jury were instructed, at the request of the city, that if the grantor was the owner of the street at the time of the conveyance to A., and at that time the street was fully defined and marked out by having fences and trees to indicate its width, and that deed was duly recorded, neither the grantor nor any one claiming under him would have a right to obstruct any part of the street as indicated by the fences and trees as they were at the time of the conveyance, and the jury can find for such land only such damages as B. would be entitled to for laying out a street over land over which A. had a right of way. The petitioner requested an instruction to the jury that the declaration in the deed to A. did not impair the right of the petitioner to full damages for all the land embraced in his deed and included in the way laid out. This instruction was also given, with the addition, "but it is for the jury to say what that right is." *Held*, that the instructions were conflicting, and that that given at the request of the petitioner was erroneous. *Held*, *also*, the deed to A. being upon certain conditions subsequent, that it was for B. to show that that deed had been defeated by breach of condition and entry therefor, and that if not so shown, it was proper for the jury to consider, upon the question of value, that the land was subject to A.'s right of way. *Ib.*

See CHARITY, 2; CONTRACT, 3; EQUITY, 7; EVIDENCE, 4, 14.

DEFAULT.

See COSTS, 1.

DEPOSITION.

At the trial of a complaint under the bastardy act, the respondent put in evidence the deposition of a witness, who testified on direct examination to having had intercourse with the complainant at a certain time. On reëxamination he testified to having seen the complainant having intercourse with other men at a time more than twelve months before the birth of her child. After the signature of the witness was a memorandum of the magistrate, who took the deposition, to the effect that after the counsel for the complainant had left, the witness wished to correct his statement as to the time mentioned in his direct examination, that the counsel for the complainant was recalled and objected, and the magistrate declined to make the cor-

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rection. The respondent was found guilty, and a bill of exceptions was allowed, which stated that the judge excluded the reëxamination. *Held*, that the memorandum of the magistrate did not form part of the reëxamination, and that the bill of exceptions did not show that the memorandum was excluded. *Sabins* v. *Jones*, 167.

DEVISE AND LEGACY.

1. A woman died seised of personal estate and of real estate, part of which she had bought prior to the date of the will, and the rest had been bequeathed to her by her brother. Her will, after certain specific bequests, constituted A. her "residuary legatee," and proceeded as follows: "The property bequeathed me by my brother, and the property I have in expectation from my sister, and any other property that may come into my possession, I will, and ordain, and bequeath," one fourth to A., and three fourths to certain other persons. *Held*, that it was the intent of the testatrix to dispose of all her estate; and that A. took, under the term "residuary legatee," all the real estate not bequeathed to the testatrix by her brother. *Laing* v. *Barbour*, 523.

2. A testator by his will bequeathed a certain sum of money to trustees, who were directed to pay the income accruing therefrom to his wife during her life. The will provided that the trust should terminate upon the death of the wife, when the trustees were directed to pay over to his wife's niece the sum of $3000; a certain sum to another legatee, and the residue of the trust fund to the residuary legatees. A codicil to the will provided: "To my wife's niece I give the sum of $7000 in addition to the $3000 given in my will, making $10,000; and I ratify and confirm my said will in all other particulars." *Held*, that the legacy given by the codicil must be paid from the trust fund upon the same conditions as the original legacy to the niece. *Snow* v. *Foley*, 102.

3. A testatrix by her will, after directing payment of all her debts, provided as follows: "All my property both real and personal of whatsoever name or kind (except what shall be disposed of hereafter) I give for the maintenance, support, and bringing up of my niece J. F., under the management of my brother E. C., as guardian during his lifetime, provided he does not bring home his wife F. or marry with some other person, in which case my brother D. C. is to have the management or guardianship heretofore named, and if the said J. F. should not live, then the property which I now give to her, the improve only I give to my brother E. C. during his lifetime, provided he marries not nor supports his present wife, in which case it must go to my brothers A. and D. C.," and then gave specific legacies to other persons. *Held*, that J. F. took an estate in fee. *Crossman* v. *Field*, 170.

4. A testator by his will provided that the residue of his estate should be divided into equal shares, and that one portion should be paid to each of his surviving children, and that the shares to be paid to his married daughters should be paid to them free from the control of their husbands, and that the daughters should alone have the right to use their respective shares. A

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codicil to the will directed that the share of one of the daughters should "be held in trust" by the executors, and provided that "they are hereby directed to pay over to her, my said daughter, from time to time, a sufficiency for her comfortable support and maintenance during the term of her natural life, excepting only, that in case she shall survive her said husband, all the remaining portion of her share of my estate shall then be paid over to her in full. My object in thus limiting the payment of my said daughter's share of my estate during the lifetime of her said husband, is to prevent his having any share or benefit of or from my estate." The daughter died after the testator, and in the lifetime of her husband, leaving a will by which she bequeathed her share of her father's estate. *Held*, that she had a vested interest in fee in her father's estate; that the time of payment to her was only postponed by the codicil; and that her executor was entitled to said share. *Holden* v. *Blaney*, 421.

5. A testator devised all his estate, real and personal, to a trustee in trust to pay of the net income thereof one third to the wife of the testator during her life; and the remaining two thirds, and, after the death of the wife, the whole of said net income, to his daughters A., B. and C., during their lives, and, after the death of one or more of them, to pay over the proportion of said net income, to which said deceased would have been entitled if living, to the legal heirs of such deceased; and, upon the death of the wife and all the daughters, to convey all the said real and personal property in fee to the legal heirs of the daughters, in equal proportions, by right of representation. The testator left a widow, two daughters by a former wife, one of whom was the daughter A. named in the will, and one daughter by his then wife, who was the daughter C. named in the will. After the death of the testator, and in the same year, A. died without issue, and C. afterwards died without issue. The wife of the testator seasonably waived the provisions of the will in her favor, under the St. of 1861, *c.* 164. *Held*, that after the widow had received the personal estate to which she was entitled, and one third of the income of the real estate, as dowress, the remaining two thirds of the income of the real estate, and the whole income of the remaining personal estate, were to be divided, upon the death of A., between the surviving sisters equally, and that upon the death of C. the sister still surviving should receive three fourths of the whole income, the remaining one fourth to be added to the income afterwards to be distributed. *Upham* v. *Emerson*, 509.

See CHARITY, 2–5; EQUITY, 7; WIDOW.

DISORDERLY HOUSE.

On the trial of a complaint for keeping a disorderly house, the evidence tended to show that the defendant kept a dance hall, which was resorted to by men and women of bad repute, and the government was permitted, against the defendant's objection, to introduce evidence that women of bad repute, resorting to the hall, had frequently while there solicited men to leave the building and go away with them for the purposes of prostitution; that the

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men went away with them, and that the defendant was then present in the hall. *Held*, it not appearing by the bill of exceptions that this was all the evidence offered at the trial, that the evidence was rightly admitted. *Commonwealth* v. *Cardoze*, 210.

DISSEISIN.

See ADVERSE POSSESSION; DEED, 2.

DISTRICT COURT.

1. A justice of a District Court may receive a complaint, under the bastardy act, and issue a warrant, when the court is not in session. *Sabins* v. *Jones*, 167.

2. A complaint under the bastardy act was addressed to the justice of a District Court and his certificate to the jurat contained the words, "before said court," followed by his signature with his official description. The warrant issued on the complaint was signed by his name and official description. *Held*, that the complaint sufficiently appeared to be made to the justice and sworn to before him, and that he issued the warrant; and that it was to be presumed that he acted under his authority as justice, and that the court was not in session. *Ib.*

DIVORCE.

1. The St. of 1873, *c.* 371, § 2, modifying the remedy given by the St. of 1870, *c.* 404, in proceedings for divorce for the cause of desertion, in cases where no judicial decree had been rendered, is within the constitutional power of the Legislature. *Wales* v. *Wales*, 89.

2. Under the St. of 1870, *c.* 404, providing for a decree *nisi* from the bonds of matrimony, for certain specified causes, including utter desertion, to be followed by an absolute decree in case the parties live separately for five years, a decree of divorce *nisi* was rendered at November term 1873 of this court upon a libel filed in May 1873, upon the default of the respondent after notice, for the cause of utter desertion from August 1872 to the date of the libel. The St. of 1873, *c.* 371, which took effect June 11, 1873, repealed the provision of the St. of 1870 authorizing the court to grant a divorce *nisi*, and provided that "no divorce shall be granted for desertion unless the desertion has continued for at least three consecutive years next prior to the filing of the libel for divorce. *Held*, upon a petition to set aside the decree, that the decree was unauthorized by law, and should be vacated. *Ib.*

3. On the trial of a libel by a wife for divorce from her husband on the ground of cruelty, the husband was permitted, without objection, to show in explanation of his conduct that he had received an anonymous letter, but was not permitted to put the contents of the letter in evidence. *Held*, that he had no ground of exception. *Mayo* v. *Mayo*, 290.

See EVIDENCE, 26, 28; EXCEPTIONS, 15.

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DOWER.

The judge, before whom a writ of dower was tried without a jury, found as a fact that the land described in the writ was conveyed to the demandant's husband; that he, on the same day, mortgaged it to a third person to secure his note to such person for money procured of him to pay for the land; and that the demandant did not join in the mortgage deed. The judge ruled, on these facts, that the demandant was entitled to dower. *Held*, that the facts stated did not conclusively prove that the seisin of the husband was instantaneous only. *Smith* v. *McCarty*, 519.

DRAIN.

See COVENANT, 1.

EASEMENT.

See DEED, 4, 6, 7.

EMINENT DOMAIN.

Under the St. of 1871, *c.* 218, authorizing the city of Lynn, for the purpose of supplying the city with pure water, to take, hold and convey into the city the waters of Breed's Pond and all water rights connected therewith, and to take and hold, by purchase or otherwise, such land on or around the margin of said pond, not exceeding five rods in width, as may be necessary for the preservation and purity of said waters; and requiring the mayor to file in the registry of deeds "a description thereof sufficiently accurate for identification," and the city to pay the damages caused by such taking; the city took certain land, and filed in the registry of deeds a certificate which described the land as "a lot commencing at the southwest corner of land owned by Charles H. Trask on Walnut Street," and running by four courses and distances, 1896 feet in all, by the northerly line of that street; thence by four successive courses and distances, each except the last terminating at a cedar post, amounting in all to 1703 feet, "to a point on the Downing road (westerly line) at its intersection with Elm Street;" thence by three courses and distances on "westerly line of road," 2496 feet in all; thence by nineteen courses and distances, each except the last terminating at a cedar post, and amounting to 8985 feet in all, "to starting point." The names of the owners of the land taken were not mentioned, nor the town or city in which the land was situated, and no plan was referred to in the description or filed with it. At the trial of an action of trespass, brought by the owner of land so taken, against the city, no monuments were proved, except along about two thirds of one side of the tract of land intended to be taken; it appeared that a very small portion of it was within the city of Lynn; a plan was introduced, subject to the plaintiff's objection, of the entire tract of land taken, and a surveyor testified that the lot could be traced and its limits made certain by the plan; but there was no evidence that the

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land could be identified by the description filed without the aid of the plan or of a surveyor; and it did not appear that all of the cedar posts called for by the description, or which, or how many of them had been set up. *Held*, that the certificate was insufficient, and that the defendant was a trespasser *Wilson* v. *Lynn*, 174.

EQUITY.

I. *Jurisdiction and General Principles.*

1. After receivers of an insurance company, established by the laws of this Commonwealth, have been appointed, and an injunction issued, under the Gen. Sts. *c.* 58, § 6, a petition in equity cannot be maintained by a creditor of a creditor of the company to reach, and apply to the payment of the petitioner's claim, the funds belonging to the creditor of the company in the hands of the receivers. *Commonwealth* v. *Hide & Leather Ins. Co.* 155.

2. This court has no jurisdiction in equity of a bill by the patentee of an invention for an injunction against a person falsely representing that the plaintiff's patent infringes upon a patent owned by himself, and thereby deterring others from purchasing the plaintiff's invention. *Whitehead* v. *Kitson*, 484.

3. An executor, who has no title as such in the real estate of his testator, and who does not allege that there is any personal estate in his hands for distribution, cannot maintain a bill in equity to obtain the instructions of this court as to the construction of the will of the testator, although the bill alleges, and the fact appears, "that there is and was left by said testator personal estate and lands." *Parker* v. *Parker*, 478.

4. If a debtor has mortgaged land, by the intervention of a third person, to his wife, without consideration and in fraud of creditors, and the wife has never taken possession, and no mortgage debt exists, but the husband remains in possession, a creditor to whom a portion of the land has been set off on execution against the debtor, and possession delivered, has a full, adequate and complete remedy at law by writ of entry against the debtor, and cannot maintain a bill in equity to obtain a release from the wife of all her right in the land set off. *Swamscott Machine Co.* v. *Perry*, 123.

5. If a person forges a deed of land to himself without the knowledge or consent of the owner, and fraudulently procures an acknowledgment of the deed by some other person, and then leases and afterwards sells the land, the owner has a plain, adequate and complete remedy at law, and cannot maintain a bill in equity against the person executing the deed, the assignee of the lessee, and the purchaser, to cancel the deeds and lease. *Boardman* v. *Jackson*, 161.

6. Where a town is annexed to a city by a statute which entitles the city to receive all uncollected taxes, and makes it liable for all the debts and obligations of the town, this court has no jurisdiction in equity to restrain the city from selling land to pay a betterment tax illegally assessed thereon; the landowner having a plain, adequate and complete remedy at law. *Norton* v. *Boston*, 194.

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7. Land was conveyed to a city in trust for the purpose of building a hospital thereon. By the terms of the deed, the city was to make an appropriation of twenty-five thousand dollars for the purpose, and to build a hospital, or part of a hospital, of a certain size, upon the land within three years, or, failing to do so, to pay the grantor, or his legal representative, the sum of two hundred dollars a month; and the land was not to be sold for twenty-five years, and then only upon the opinion of three fourths of the board of trustees that it was unsuitable for a city hospital, and upon the setting apart of a sum of money equal to the value of the land, as then ascertained by three appraisers, as a permanent fund for the city hospital. The city was duly authorized by the legislature to erect and maintain a city hospital, and accepted the grant of the said land. The grantor by his will, after devising all the residue of his estate to the city in trust, to be by it applied for the sole use and benefit of the city hospital, provided as follows: "While I would not wish to give any particular direction to the bequest, nor incur the risk of defeating the purpose I have in view in making it, by imposing any limitations or condition as to the manner of its use, still I should prefer to see it set apart as a separate fund, and the income thereof only applied to the support and maintenance of said hospital, if such course shall commend itself to the wisdom of those having it in charge." *Held*, that a bill in equity brought by the city after the death of the grantor and within three years after the grant, seeking to release the city from the obligation of building a hospital upon the land within three years from the date of the deed, and to enable the city to sell the land immediately for its own benefit, on the ground that the city had made other provisions for a suitable and convenient city hospital elsewhere, that it would be inexpedient and unnecessary to erect a hospital on the land, and that said land, on account of its situation, its northern exposure and nature of its soil, was not a suitable, convenient or wholesome place for the erection of a hospital for the reception and care of sick persons, could not be maintained. *Worcester* v. *Kelley*, 575.

See CHARITY, 2, 4; CORPORATION; DEED, 6; PARTNERSHIP, 3; PROBATE COURT; SPECIFIC PERFORMANCE; TRUST AND TRUSTEE.

II. *Pleading and Practice.*

See TRUST AND TRUSTEE.

ERROR.

1. The time for pleading to a writ of error may be enlarged under the 29th rule of this court. *Tufts* v. *Newton*, 476.
2. If on a writ of error to the Superior Court a record is sent to this court, which is afterwards amended on a writ of certiorari, the validity of the proceedings is to be determined by the amended record. *Crimm* v. *Commonwealth*, 326.

See GRAND JURY, 4; SUPREME JUDICIAL COURT.

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ESTATE IN FEE.

See DEVISE AND LEGACY, 3.

ESTOPPEL.

See DEED, 12, 13; FISHERY, 4.

EVICTION.

See COVENANT, 2–4.

EVIDENCE.

1. Under the St. of 1864, *c.* 121, § 1, if a person charged with keeping intoxicating liquors for sale in violation of law is proved to have kept them for sale, the burden of proving that he had a license or authority so to do is upon him. *Commonwealth* v. *Curran*, 206.

2. In an action to recover the freight due under a charter party, by the terms of which the plaintiff is to take a cargo on board with all convenient speed, and proceed direct to the port of delivery, and the declaration alleges that the plaintiff performed all things in the charter contained on his part to be performed, and the cargo is delivered in a damaged condition, and the issue is whether the vessel unnecessarily delayed in her port of departure before sailing and deviated upon the voyage, the burden of proof is upon the plaintiff to show that he had complied with the terms of the charter party on his part to be performed. *Funcheon* v. *Harvey*, 469.

3. In an action by an assignee in bankruptcy to recover money alleged to have been fraudulently paid by the bankrupt to the defendant, evidence of what the bankrupt said to the defendant, some days before, when he borrowed the money of him, as to what he wanted it for, or of statements then made by the bankrupt as to his pecuniary condition, or of the time fixed for repayment, has no bearing on the question whether the defendant knew or had reasonable cause to believe the bankrupt to be insolvent at the time he repaid it. *Goodrich* v. *Wilson*, 429.

4. Upon an action of contract for a breach of warranty in a deed by the defendant to the plaintiff of land in W. R., and the non-payment of a mortgage debt of the plaintiff as stipulated in a deed of the plaintiff to the defendant, of land in H. P., it appeared that the parties had bargained to exchange the land in H. P., and land in B. belonging to the plaintiff, for the land in W. R. belonging to the defendant. The execution of this exchange was disputed by the defendant. The plaintiff introduced his deed to the defendant of the land in B., and was permitted, against the defendant's objection, to put in an agreement signed by the defendant, and dated two days after the latter deed, whereby the defendant agreed to convey to the plaintiff the same land in B. *Held*, that the paper, as evidence that the defendant, after the date when the plaintiff contended that the deeds were delivered, had treated the land in B. as his own, tended to show that the bargain had been carried out. *Furnas* v. *Durgin*, 500.

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5. In an action against an executor to recover for services and disbursements in a suit brought by the plaintiff against a corporation for which it was contended the testator promised to pay, the plaintiff relied upon the testimony of a witness called by him that the testator had before that suit was brought agreed to pay for the expenses thereof, if it could not be settled for a certain amount. The defendant was permitted, against the plaintiff's objection, to testify for himself that, at an interview, during the pendency of that suit, at which the testator, the witness for the plaintiff and himself were present, the testator stated that the defendant was to look after his matters, that he wanted the defendant to understand that he never had any transactions with the corporation or any suit that was to be or had been brought against it, to which the witness made no reply, and that the testator further said that he had not long to live and wanted them to know about it. The jury were instructed that if the persons in whose presence the statements were made by the testator had no authority from the plaintiff to act in the matter to which the statements related, the jury were not to consider those statements as testified to by the defendant. *Held*, that the evidence was rightly admitted, as tending to contradict the plaintiff's witness, although the statements were made by the testator after the suit was brought. *Held*, *also*, that the instruction was sufficiently favorable to the plaintiff. *Hill* v. *Crompton*, 376.

6. In an action against an executor to recover for services and disbursements in a suit brought by the plaintiff against a corporation, for which it was contended the testator promised to pay, the plaintiff relied upon the testimony of a witness that in reply to a question of the plaintiff as to what they should do about the suit, the testator said, "If you can settle the matter by taking off $400 or $500, do so; if not, fight it, and I will pay the bill." Another witness gave substantially the same testimony, except that he did not refer to the matter of attempting a settlement as stated by the first witness. *Held*, that the jury were rightly instructed that the plaintiff could not recover without showing that he attempted to settle with the corporation by throwing off $400 or $500 before he brought the suit, although the answer contained only a general denial. *Ib.*

7. On the trial of an indictment for robbery, it appeared that the defendant was not arrested until the end of the third day after the robbery, and the evidence was conflicting whether he had been concealing himself during the whole or any part of that time. To show such concealment the government called as a witness a policeman, who assisted in the arrest, and asked him, How soon after the robbery did you commence looking for the defendant? *Held*, that the question was rightly permitted to be answered. *Commonwealth* v. *Tolliver*, 312.

8. On the trial of an indictment for robbery, the government introduced evidence that the defendant had concealed himself to avoid arrest. The defendant offered evidence tending to show that instead of concealing himself, he was publicly walking about the streets before his arrest. The government then offered to show that while walking about the streets for an hour or two

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previous *to* the arrest, the defendant had assumed a disguised gait and manner. The defendant had introduced no evidence upon this point, and the judge ruled that such testimony could be properly given, although no testimony had been given by him or question asked of him in relation to any disguise adopted by him. *Held*, that it was within the discretion of the presiding judge to admit the evidence, and that the ruling was correct. *Commonwealth* v. *Tolliver*, 312.

9. On the trial of an indictment for robbery, the person robbed testified that she was robbed of a ten dollar bill, a five dollar bill, and three two dollar bills, but she was unable to say whether they were bank bills or not. When the defendant was arrested three days after the robbery, he was found to have in his possession two five dollar bank bills, and two two dollar bills, one of which was a bank bill, and the other not. The person robbed had testified that in the struggle with the robbers she bit the finger of one of them so as to cause a wound, and when arrested there was a wound upon the corresponding finger of the defendant's hand. There was a stain on one of the two dollar bills which the government contended was a blood stain, but there was no evidence that it was such except what appeared on inspection, and there was no evidence of the identity of the money other than this. The person robbed could not identify the money found upon the defendant as hers, or any of it, and there was no other evidence as to what she was robbed of. *Held*, that the question was rightly submitted to the jury whether any of the bills found on the defendant were taken from the person robbed. *Ib.*

10. In an action against a street railway corporation for injuries caused by the act of one of its conductors in wrongfully expelling a passenger from a car, the plaintiff introduced evidence that his knee was injured while he was so expelled; that in consequence he was confined to his house from four to six months, and was afterwards obliged to walk with crutches. The defendant introduced evidence, in reply, that the plaintiff was seen walking in his dooryard, and the streets, with little apparent lameness and without crutches, within two or three days after the alleged injuries were received, and from time to time within the period named by the plaintiff. The plaintiff, at the close of the defendant's evidence, offered evidence that during that period the witnesses had seen him in his house with his foot upon a pillow, and had helped him from his chair to his bed. It did not appear that this evidence related to the days and times testified to by the defendant's witnesses. *Held*, that this evidence was part of the plaintiff's case, and that it was within the discretion of the judge at the trial to exclude it when offered in rebuttal. *Wallace* v. *Taunton Street Railway*, 91.

11. The extent to which a witness may be cross-examined to prove bias rests largely in the discretion of the judge presiding at the trial; and where, in an action against a corporation, it appears that its president and treasurer are members of another corporation having persons in its employ, and the plaintiff's counsel, in cross-examining a witness for the defendant, asks him if he is not an employee of the latter corporation, for the purpose of showing bias, no exception lies to the exclusion of the evidence. *Ib.*

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12. On an indictment for the malicious burning of a building on September 10, 1875, it is competent for the government to show, on the question of the intent with which the defendant burned the building on that day, that on August 24 and on September 6, 1875, the defendant set fire to a shed ten feet distant from the building, and connected therewith by a flight of steps. *Commonwealth* v. *McCarthy*, 354.

13. In a criminal case, the admission by the defendant that the act was done with a malicious intent does not preclude the government from proving such intent. *Ib.*

14. The recital in a deed of land of the consideration paid is not admissible in evidence to show the value of adjoining land, as between persons not parties to the deed. *Rose* v. *Taunton*, 99.

15. Upon the assessment of damages sustained by the taking of land for a highway, a witness who has testified without objection to the value of the land taken, may state the reasons of his opinion. *Hawkins* v. *Fall River*, 94.

16. On the issue of the value to the lessee of rooms in a building which had been taken by a city to widen a street, it is within the discretion of the judge presiding at the trial to permit a witness who underlets rooms in a building in the vicinity, and who, for this purpose, has informed himself generally of the rents of buildings, to give an opinion as to the value of the lessee's premises, although he has not examined, and is not familiar with, the building in question. *Lawrence* v. *Boston*, 126.

17. Upon the assessment of damages sustained by the taking of land for a railroad, it appeared that the estate out of which the land was taken was a farm, and that the land taken was on the bank of a river. The bill of exceptions stated that a farmer who had lived many years in the vicinity of the land, and had known of sales of land in the neighborhood, and was allowed without objection to testify as to the value of the land taken, and of the inconveniences resulting to a farmer from being deprived of access to the river, was asked what in his opinion was the damage to the remainder of the farm of the loss of the river bank, which was excluded; that the petitioner also claimed damages by reason of being excluded from the river bank for purposes of fishing and from a fishing ground, but that it did not appear that the witness had any special or superior knowledge on the subject of fishing or of fishing grounds; and that other witnesses for the petitioner testified to the value of the river bank as affording facilities for fishing. *Held*, that the bill of exceptions disclosed no error in the exclusion of the farmer's testimony. *Boston & Maine Railroad* v. *Montgomery*, 114.

18. In an action by a savings bank upon a promissory note, against one signing as surety thereon, parol evidence that the defendant signed the note solely at the request of the treasurer of the bank, because of a rule thereof as to the number of the names required upon a loan, and upon the assurance that the bank would not look to him for payment, is inadmissible as contradicting the written contract. *Barnstable Savings Bank* v. *Ballou*, 487.

19. At the time of negotiations for the purchase of land, a sewer was in process of construction in the street on which the land abutted; the party pro-

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posing to purchase called the owner's attention to the sewer, and asked him who was to pay for the sewer, to which the owner replied that he would, and that the other party should not be called upon to pay a cent for it. A deed of the land was subsequently given, with the usual warranty against incumbrances, but no mention was made in it of the sewer. The purchaser afterwards paid an assessment upon the land for the construction of the sewer. *Held*, in an action by him against his grantor upon a special promise to pay any assessment which should be laid on account of the sewer, in which the consideration was averred to be the purchase of the land, that evidence of the conversation and of the existing circumstances was sufficient to prove the promise. *Held, also*, that the evidence was competent, and was not open to the objection that it varied or enlarged the written instrument; and that the promise proved was not within the statute of frauds. *Carr* v. *Dooley*, 294.

20. On the trial of an indictment, charging the defendant in the first count with the forgery of a bond to dissolve an attachment, and in the second count with knowingly uttering the forged bond, the government proceeded upon the ground that the defendant fraudulently presented to a master in chancery a bond to dissolve an attachment purporting to be signed by S and J. as sureties; that at the same time he produced before the master two accomplices, who falsely represented themselves to be S. and J., and testified to their sufficiency as sureties; and that the names of S. and J. were fictitious names signed or procured to be signed by the defendant. The government also offered evidence that no such persons as S. and J. could be found. The defendant offered to show, in explanation of the absence of S. and J. as witnesses in his behalf, that the prosecuting officer had openly threatened to prosecute them for perjury, and that they thereupon fled the Commonwealth and had not returned, and that he had made efforts to procure their attendance as witnesses. *Held*, that the exclusion of this evidence gave the defendant good ground of exception. *Commonwealth* v. *Costello*, 214.

21. The declarations of an occupant of land, in disparagement of his title, are admissible in evidence against one subsequently attaching and levying upon the land as his property. *Pickering* v. *Reynolds*, 111.

22. On the trial of a petition by the lessee of a part of a building, for the assessment of damages occasioned by the taking by a city of land, on which the building stood, to widen a street, it appeared that the owner of the estate surrendered the entire estate to the city by a deed in which he covenanted to indemnify the city against all claims for damages, and that in pursuance of this agreement he defended the action. *Held*, that declarations by him as to the value of the lease, made after notice to him of the taking and before his agreement with the city, were not admissible in evidence except to contradict him. *Lawrence* v. *Boston*, 126.

23. At the trial of an indictment for burning a dwelling-house there was evidence tending to show that the house was set on fire by some one, and there were facts and circumstances pointing to the defendant, a girl fourteen years

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old, as the probable incendiary. The government was permitted to introduce evidence that after her arrest, and while in custody, the defendant confessed to officers, when questioned by them, that she set the fire, and stated how she did it, but it did not appear that any threats or promises were made by the officers. The jury were instructed that they should give no weight to the confession if it was induced by threats or promises; but, if it was not so induced, that such weight should be given to it as they thought it entitled to; that threats and inducements might be by acts as well as words; and that mere fear on the part of the defendant did not render the confession incompetent unless induced by some improper conduct on the part of the officers. *Held*, that the evidence was rightly admitted. *Held, also*, that the instructions were correct. *Held, also*, that the confession, being supported by independent evidence, would warrant a conviction. *Commonwealth* v. *Smith*, 305.

24. On the trial of an indictment for robbery, the government offered to prove certain confessions by the defendant, which the judge excluded as having been obtained by promises and threats made to him by officers. The defendant afterwards took the stand and testified in his own behalf, and upon cross-examination was asked by the government what statements he had made in the interview in which the confessions were made. The judge ruled that having made himself a witness, the inquiry could be made whether he made statements inconsistent with his testimony on the stand, as affecting his credit. *Held*, that the instruction was sufficiently favorable to the defendant. *Commonwealth* v. *Tolliver*, 312.

25. In an action by an assignee in bankruptcy to recover money alleged to have been fraudulently paid by the bankrupt to the defendant, it appeared that the defendant had admitted that a statement made by the bankrupt, at his examination before the register, in regard to the money paid by him, was true. *Held*, that the plaintiff was rightly permitted to show what the statement was by any one who heard it, and the fact that it was made in the course of the bankrupt's examination before the register did not render it incompetent. *Goodrich* v. *Wilson*, 429.

26. On the trial of a libel by a wife for divorce from her husband on the ground of adultery, the libellant contended that the husband had committed adultery with A., and put in evidence tending to show that he and A. were found together in the same room at a hotel in the night-time, under circumstances which justified the inference of adulterous intercourse. The husband contended and put in evidence, tending to show that he was at the hotel in his professional capacity as a dentist, and that the libellant, A. and a private detective, had formed a criminal conspiracy to entice him to the hotel and place him in an equivocal position with A. so as to furnish false evidence of adultery. The husband called A. and asked her if she was the woman spoken of as being in the hotel with him. She declined to answer on the ground that it would tend to criminate herself, and the judge instructed her that she was not obliged to do so. He then asked her a number of questions which she answered without objection, and which, so far

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as relevant, would furnish links in a chain of evidence tending to convict her either of adultery or criminal conspiracy. She then declined to answer further. The judge then instructed her as to her rights more fully than at first, and inquired of her if she had fully understood them. She replied that she had not. *Held*, that it was within the discretion of the presiding judge to allow the witness then to claim her privilege, and to order her evidence already given to be struck out of the case. *Mayo* v. *Mayo*, 290.

27. If the testimony of a witness is struck out of the case, on the ground of her misapprehension of her privilege as a witness, the party calling her cannot put in her declarations or admissions to contradict her under the St. of 1869, *c.* 425. *Ib.*

28. On the trial of a libel by a wife for divorce from her husband on the ground of adultery, the woman with whom the husband was charged with having had adulterous intercourse was called by the libellee as a witness, testified, and her testimony was afterwards stricken out on the ground of her misapprehension of her privilege as a witness. She was then asked by the libellee, "Whom she had met and with whom she had been in conversation since the adjournment of the court" several days before. The judge ruled that the libellee might show any conversations with the libellant or any agent of hers, but beyond this the question was immaterial. *Held*, there being no testimony of the witness in the case to be contradicted by such conversations, that the ruling was correct. *Ib.*

29. Where a person accused of a criminal offence introduces evidence tending to show that his general reputation is good, it is not competent for the government in reply to put in evidence of particular facts. *Commonwealth* v. *O'Brien*, 342.

30. In an action to recover the price of goods sold and delivered, the only issue was whether the delivery of the goods, which was made to a third party, was upon the defendant's order and credit. The plaintiff offered to show by entries in his books of account that the articles were charged to the defendant, and credit given alone to him. The judge excluded the evidence for that purpose, and ruled that "the entry in the book might be regarded as a memorandum made by the plaintiff at the time, and, as such, entitled to some weight in confirmation of the recollection and evidence of the plaintiff," upon the issue. *Held*, that the first ruling excluding the evidence was correct, and that the second ruling was erroneous. *Field* v. *Thompson*, 151.

See ACTION, 1, 2; APPEAL, 6; BASTARDY PROCESS, 2; COMPOSITION, 3, 5; CONTRACT, 9; COVENANT, 3; DEED, 4, 6; DEPOSITION; DISORDERLY HOUSE; DIVORCE, 3; EXCEPTIONS, 5, 11–14, 17, 18; FISHERY, 4; FRAUDULENT CONVEYANCE; GIFT; GUARANTY; INSURANCE, 1, 2, 11; INTOXICATING LIQUORS, 1–4, 11; JUDGMENT, 2; LARCENY; MARRIED WOMAN; MASTER AND SERVANT, 3; MORTGAGE, 1; PAYMENT; PERJURY, 2–8; PRINCIPAL AND AGENT; PROMISSORY NOTE, 2, 4; SAVINGS BANK; SHIP, 2; SLANDER, 1, 2; WAY, 3, 8, 14.

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EXCEPTIONS.

1. An *amicus curiæ* is heard only by the leave and for the assistance of the court, and upon a case already before it; he has no right to take the case up by bill of exceptions or otherwise. *Martin* v. *Tapley*, 116.

2. After verdict for the plaintiff in an action of contract, the defendant died, and the plaintiff moved the court to strike from the record a plea of discharge in bankruptcy filed by the defendant since the verdict, and to enter judgment *nunc pro tunc* as of a term before his death. At the hearing on these motions, no executor or administrator of the defendant having been appointed, his heir, and the sureties on the bond given to dissolve the attachment on the writ, were allowed by the presiding judge to appear for the purpose of being heard on these motions, but not as parties to the suit; and the counsel of the deceased defendant was heard in their behalf, and as *amicus curiæ*. *Held*, that neither the heir, nor the sureties, nor the *amicus curiæ*, could allege exceptions to an order of the judge granting the motions. *Ib.*

3. Under the Gen. Sts. *c.* 115, § 7, if exceptions are not presented to the presiding judge, or application made to him for an extension of the time for presenting them, before the final adjournment of the court, they cannot be allowed without the consent of the adverse party, although they are filed within three days after the verdict. *Commonwealth* v. *Greenlaw*, 208.

4. Under the Gen. Sts. *c.* 115, § 7, a bill of exceptions must be presented to the judge, as well as filed with the clerk, within the time therein specified; and unless so filed the judge is not obliged to allow them. *Tufts* v. *Newton*, 476.

5. Whether a judge errs in disallowing a bill of exceptions is a matter of record, and cannot be affected by oral evidence of his reasons. *Ib.*

6. Exceptions which are certified by the judge, who presided at the trial, not to have been saved or taken at the trial are not open in this court. *Brown* v. *Abington Savings Bank*, 69.

7. Exceptions, alleged by the plaintiff in trustee process to a ruling in favor of an adverse claimant to the funds in the hands of the trustee, cannot be entered in this court before judgment has been rendered in the court below discharging the trustee for the amount allowed to the claimant. *Gifford* v. *Rockett*, 71.

8. Where a declaration contains two counts for different causes of action, and the jury are instructed to return a verdict upon both, but return a verdict upon one only, and the cause of action set forth in the other count is not determined by further trial, discontinuance or otherwise, the whole case is not finally disposed of, and exceptions to a ruling of the Superior Court cannot be entered in this court. *Harding* v. *Pratt*, 188.

9. Under the St. of 1871, *c.* 361, authorizing the city of Worcester to supply itself with pure water, and providing in § 3 for the payment of damages by the city to persons injured thereby, and for the appointment by the Superior Court of three commissioners to assess the damages, an order of the Superior Court appointing such commissioners is interlocutory merely, and exceptions thereto cannot be entered in this court until after a final disposition of the case in the court below. *Crompton Carpet Co.* v. *Worcester*, 375.

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10. Under the Gen. Sts. *c.* 43, § 40, authorizing the Superior Court to set aside the verdict of a sheriff's jury for "good cause," the question whether, upon the proof of the irregular and improper conduct of the officer having the jury in charge, the verdict should be set aside or accepted by the Superior Court, is within the discretion of the presiding judge, and to the exercise of that discretion no exception lies. *Brady* v. *American Print Works*, 98.

11. At the trial for the assessment of damages sustained by the taking of land for a highway, under the Gen. Sts. *c.* 43, the petitioner offered office copies of four deeds of land in the neighborhood to show the price paid for the lots of land described therein. Objection was made to the admission of all the deeds, but special grounds of objection were assigned to the admission of three of them only. All the deeds were admitted in evidence. *Held*, that all the deeds were duly objected to at the trial as incompetent evidence of the price or value of the land, and that the respondent was entitled to insist upon this objection as a ground for setting aside the verdict. *Rose* v. *Taunton*, 99.

12. Upon the issue, on the trial of a writ of entry, whether the tenant, or his father of the same name, under whom the demandant claimed, was grantee in a deed of land to one of that name, the bill of exceptions showed that the demandant introduced evidence tending to show that the father was grantee, that the deed was delivered to him, that after the delivery of the deed he made declarations as to the property when digging a cellar upon the premises, which were excluded in evidence without exception by the demandant. The tenant introduced evidence that his father bought the land with his money, that his father gave him a deed of the land after the action was commenced, and not before, and declarations of the father when digging the cellar that he bought the land for the tenant. The demandant in reply offered evidence of the declarations of the father to other persons, when digging the cellar, and before the action was commenced, that the land was his. This evidence was excluded. It was not contended that these declarations were part of the declarations of the father, put in evidence by the tenant. *Held*, that their exclusion, when offered in rebuttal, gave the demandant no ground of exception. *Pickering* v. *Reynolds*, 111.

13. In an action against a city for injuries occasioned by a defective highway, one issue was whether the plaintiff's horse was going at an improper rate of speed. A witness for the plaintiff testified, on cross-examination, that the horse was short-gaited, and looked as if he was travelling faster than he really did go. The defendant then asked the witness "What was his speed?" not for the purpose of showing the specific speed at the time of the accident, but to show the horse's ability for speed, and to control the testimony of the plaintiff's witness in cross-examination. *Held*, that the refusal to allow this question to be put afforded the defendant no ground of exception. *Tuttle* v. *Lawrence*, 276.

14. In an action against a city for injuries occasioned by a defective highway, a witness who saw the plaintiff driving in a sleigh at the time of the acci-

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dent, was asked if it was possible for the sleigh, at the angle it was crossing a railroad track, to have gone into an excavation, which was the alleged defect. *Held*, that the refusal to allow this question to be put afforded the defendant no ground of exception. *Tuttle* v. *Lawrence*, 276.

15. On the trial of a libel by a wife for divorce from her husband on the ground of adultery, the woman with whom the husband was charged with having had adulterous intercourse was called by the libellee as a witness, testified, and her testimony was afterwards stricken out because of her misapprehension of her privilege as a witness. The libellee argued to the jury, without any adverse ruling being made, that he had done all he could to get the woman as a witness and to make her testify as to the facts. The judge in his charge stated that the case must be considered as if the woman had never been put upon the stand. *Held*, that this expression in the charge gave the libellee no ground of exception. *Mayo* v. *Mayo*, 290.

16. On a bill of exceptions to the refusal of a judge to set aside a verdict and grant a new trial, asked for on the ground that the verdict was for a larger amount than was warranted by the instructions given, this court will not sustain the exceptions unless they present sufficient facts to enable the court to perceive that the judge erred in matter of law in holding that there had been no error in the computation to the injury of the excepting party. *Hill* v. *Crompton*, 376.

17. On the trial of an indictment for an assault with a knife, the government called a witness who testified that on the evening of the assault a man came to his shop and bought a knife of the same make and style as the knife, which the government contended was in the hands of the defendant when the assault was committed; that he was not sure that the defendant was the man who bought the knife. He was then permitted against the defendant's objection to state a conversation which he had at the time of the sale with the man who bought the knife. *Held*, on a bill of exceptions, which did not state what the conversation was, that the defendant had no ground of exception to the admission of this conversation. *Commonwealth* v. *O'Brien*, 342.

18. On the trial of an indictment for the malicious burning of a building, the government contended that the motive of the defendant in setting the fire was to destroy his stock of goods, which was insured for more than its value, which was about $500 on the day of the fire; that on that date the defendant had insurance on the stock to the amount of $2000. To meet this evidence the defendant put in office copies of two mortgages on the goods, dated about six months before the fire; one to secure payment of a note of $1000, and the other a note of $700, both signed by the defendant. No other evidence was introduced respecting the mortgages. *Held*, that the mortgages were immaterial, and that the correctness of instructions in regard to them need not be considered. *Commonwealth* v. *McCarthy*, 354.

19. In an action by an assignee in bankruptcy to recover $1500 alleged to have been fraudulently paid to the defendant by the bankrupt, the defendant asked the judge to instruct the jury that if the defendant made a contract

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with the bankrupt, before proceedings in bankruptcy had been instituted, to render him personal services and pay for other legal services to be rendered to or for the bankrupt, the contract would be valid, and the assignee would not be entitled to recover the money paid under that contract, if the defendant complied with the terms of that contract; and that the payment was not a preference, unless it was made in pursuance of a fraudulent combination between the bankrupt and the defendant. The judge refused so to rule, and instructed the jury that a person had a right to retain counsel to assist him in the proper discharge of his duty as a debtor in court, under the bankrupt act, but that if insolvent he could not retain counsel for any other purpose; that if the amount was paid as a retainer, with the intent to prevent so much as was in excess of what was reasonable from going to the creditors, and the defendant knew that the payer was insolvent, and knew, or had reasonable cause to know, that he did it for this purpose, the assignee could recover the whole amount paid. *Held*, that the instructions were sufficiently favorable to the defendant, and that he had no ground of exception. *Goodrich* v. *Wilson*, 429.

20. In an action to recover compensation for services in effecting a lease, the plaintiff contended that the defendant agreed to pay him regular brokers' commissions, and put in evidence of what a broker would be entitled to by the custom. The judge ruled, against the defendant's objection, that the custom was a reasonable one, and instructed the jury that they should find according to the custom, if they found that the defendant agreed as alleged; but that, if they found that the services were rendered without an agreement as to compensation, they should find the value of the services. The jury returned a verdict for a less sum than that testified to as allowed by the custom. *Held*, on the defendant's bill of exceptions, that the question of the reasonableness of the custom need not be considered. *Pratt* v. *Paine*, 439.

21. In an action against a town, for personal injuries caused by a defect in a highway, the defendant requested a ruling that the plaintiff could not recover unless she satisfied the jury that the injury was caused by the defect in the way without fault on her part. The instruction given was that "the plaintiff must satisfy the jury that she was in the exercise of due care at the time of the alleged injury, and if a want of due care on her part contributed in any degree to the injury she cannot recover, though it would not have occurred except for the omission of the town to perform its duty." *Held*, that the request did not call the attention of the presiding judge to the rule of law that it must appear that the injury was caused solely by a defect in the way, but only to the question of contributory negligence on the part of the plaintiff, and that the defendant had no ground of exception. *Whitford* v. *Southbridge*, 564.

22. Where a petition to establish the truth of exceptions is referred to a commissioner to hear the parties and report the facts, and there is a conflict of testimony, or controversy as to the inferences of fact to be drawn from the evidence, it is the right of either party to have the judgment of the ful

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court thereon, and a motion to recommit the report to the commissioner to report the evidence upon which his findings were based will be granted. *Ela* v. *Cockshott*, 416.

18. A bill of exceptions tendered stated that requests for instructions were presented to the judge by the petitioner's counsel before the arguments; that the judge refused to receive or read them; that he accompanied his refusal with the statement that if the counsel was not satisfied with his instructions to the jury, he could except to them; and that at the close of the charge the judge asked the counsel to state briefly the substance of his requests, and the counsel then read the requests. The evidence reported by the commissioner, to whom a petition to establish the truth of the exceptions was referred, showed that no requests for instructions were presented to the judge until after the arguments and just before the charge; that the judge did not refuse to receive the requests for instructions before the arguments; that when he refused to read the requests just before the charge, he informed the counsel that at the close of the charge he could call the judge's attention to any point not covered by it; that after the charge he again asked the counsel to call his attention to any point in the instructions to which he objected; and that the counsel, instead of doing so, insisted on reading in full his request for instructions. *Held*, that the exceptions were rightly disallowed. *Ib.*

See APPEAL, 2; ARBITRAMENT AND AWARD, 3; ASSAULT, 2; BANKRUPT, 3; DAMAGES, 2; DEED, 9; DEPOSITION; DISORDERLY HOUSE; DIVORCE, 3; EVIDENCE, 8, 13, 16, 20; INTOXICATING LIQUORS, 3; MARRIED WOMAN, 2; PAYMENT, 2, 3; SUPREME JUDICIAL COURT; WAY, 15–18.

EXECUTOR AND ADMINISTRATOR.

1. If, pending an action against several defendants sued on a joint contract, one of them dies, his executor or administrator cannot, under the statutes of this Commonwealth, be summoned in to defend the action. *New Haven & Northampton Co.* v. *Hayden*, 361.

2. An agreement made by a party to an action, as to the amount of the judgment to be rendered against him, does not affect the form of the remedy against his estate. *Ib.*

See EQUITY, 3; EVIDENCE, 5, 6.

FENCE.

See RAILROAD.

FISHERY.

1. A complaint under the St. of 1869, *c.* 384, § 19, which charges the defendant with fishing in a certain pond, "in which fishes are lawfully artificially cultivated or maintained, without the permission of B., the proprietor of the pond," is sufficient without further designating the nature of B.'s interest. *Commonwealth* v. *Tiffany*, 300.

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2. Under the St. of 1869, *c.* 384, § 9, authorizing the commissioners of inland fisheries to lease, in the name of the Commonwealth, any great pond, exceeding twenty acres in area, for the purpose of cultivating useful fishes, the commissioners have authority to lease a pond which exceeds twenty acres in extent in its natural condition, although it has been increased beyond that extent by a dam. *Commonwealth* v. *Tiffany*, 300.

3. The provision of the St. of 1869, *c.* 384, § 7, that the proprietors of any pond or parts of a pond, created by artificial flowage, shall have exclusive control of the fisheries therein existing, does not deprive the commissioners of their authority, under § 9 of the statute, to lease any pond exceeding twenty acres in area in its natural condition, although the pond has been increased in extent by artificial flowage. *Ib.*

4. A warrant for a town meeting contained an article, "to see if the town will sell the Herring Brook for three years or more, as the town may deem proper, to the highest bidder." Under this article, Herring Brook was sold to the defendant for three years, for $170 a year, he being the highest bidder. *Held*, in an action by the town to recover the price agreed, in which it appeared that the defendant had enjoyed the fishery, that the sale by the town was in the nature of a lease, and that the defendant was estopped to deny the title of the town or its right to sell the fishery, unless he was evicted or interrupted by some one having a paramount title; and that the questions how far the brook was understood to extend, and whether it was navigable where the defendant took fish, were for the jury. *Eastham* v. *Anderson*, 526.

5. The St. of 1871, *c.* 281, § 2, providing that "the proprietor of any unnavigable tidal stream, where the same empties into salt water, and in which fishes are lawfully cultivated or maintained, shall control the fishery of said stream within his own premises, and also beyond and around the mouth of said stream, so far as the tide may ebb, provided, it does not ebb more than eighty rods," applies only to cases where the waters of a stream are inclosed by the proprietor for the purpose of cultivating fishes. *Ib.*

6. The lessee from a town of the right of fishery in a brook is liable for the stipulated rent, if he has enjoyed the premises, notwithstanding the statute of frauds, although his promise is not in writing. *Ib.*

FLATS.

The provisions of the St. of 1866, *c.* 149, requiring all persons filling up flats by authority of the Legislature to submit their plans to the approval of the board of harbor commissioners, and to make compensation for the tide water thus displaced, do not apply to work done by the boards of mayor and aldermen of Cambridge and Somerville in filling up the flats in pursuance of the power conferred upon them by the St. of 1873, *c.* 304, and according to the plan devised by the harbor commissioners, acting jointly with the state board of health, under the St. of 1872, *c.* 353. *Attorney General* v. *Cambridge*, 518.

FORGERY.

See EVIDENCE, 20.

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FRAUDS, STATUTE OF.

A. entered into a written contract with B., by which B. agreed to build a house and barn for A., and do all the carpenter's work, and furnish all the material for a gross sum. B. afterwards ordered of C. in his own name, the windows and doors necessary for the house and barn, and, after some of them were delivered and placed in the buildings, A. called at C.'s shop to get the rest of the windows, and was told by C. that he had doubts of B.'s solvency, and had concluded not to trust him for the goods, and for that reason had withheld the remaining windows, and A. thereupon directed the plaintiff to send the goods to B. and charge them to A., and promised to pay for them. C. afterwards gave no credit to B., but wholly to A., but did not inform B. of the conversation, and afterwards delivered the goods to B. as he called for them. *Held*, in an action by C. against A. that the jury were warranted in finding that the promise sued on was a promise to pay the defendant's own debt, and not a promise to answer for the debt of another within the statute of frauds. *Walker* v. *Hill*, 249.

See EVIDENCE, 19; FISHERY, 6.

FRAUDULENT CONVEYANCE.

In an action by an assignee in bankruptcy to recover the value of personal property upon the ground of a fraudulent preference, the plaintiff requested the court to instruct the jury "that the transfer in any case by a debtor of a large portion of his property, while he is insolvent, to one creditor, without making provision for an equal distribution of its proceeds to all his creditors, necessarily operates as a preference to him, and must be taken as conclusive evidence that a preference was intended, unless the debtor can show that he was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts. The burden of proof is upon him, in such a case, and not on the assignee." This instruction was not given, and the jury were instructed that the burden of proof throughout was on the plaintiff, but that the intent of the parties might be inferred from their acts, and that, if the conveyance to the defendant was out of the usual and ordinary course of business, the statute made it *prima facie* evidence of the fraudulent intent of the parties. *Held*, that the instruction given was correct; and that the plaintiff had no ground of exception. *Parsons* v. *Topliff*, 245.

See BANKRUPT, 1, 3; EQUITY, 4.

FREIGHT.

See EVIDENCE, 2.

GAMING.

1. A complaint on the Gen. Sts. *c.* 170, § 2, as amended by the St. of 1869, *c.* 364, § 2, alleged belief that "gaming apparatus and implements are used, kept and provided to be used in unlawful gaming, in certain rooms resorted to for the purpose of unlawful gaming, in a certain building sit

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uated and numbered thirteen and one half in Hayward Place, in Boston, that is to say, in the rooms in the second, third and fourth stories of said building, and also that furniture, fixtures and personal property are contained therein, and may be found therein at a time when persons may there be found playing at some unlawful game, which said rooms are occupied by some person whose name is to your complainant unknown." The warrant issued on this complaint directed the officer to enter the rooms mentioned in the complaint and search for and seize said gaming apparatus and imple ments, and also to search for and seize all the furniture, fixtures and personal property found in the rooms described in the complaint, at the time when any persons are there found playing at any unlawful game. *Held*, that the premises to be searched were sufficiently described. *Commonwealth* v. *Gaming Implements*, 332.

2. Under the St. of 1869, *c.* 364, § 2, authorizing the search for and seizure "of all the furniture, fixtures and personal property found in" a gaming-house, the officer is not limited in his right to seize, under a warrant following the words of the statute, merely the personal property liable to condemnation. *Ib.*

3. An information, filed after the return of a warrant issued on a complaint under the Gen. Sts. *c.* 170, § 2, as amended by the St. of 1869, *c.* 364, § 2, after reciting the complaint and the warrant, averred that "by virtue of said warrant" the informant, on a day named, entered the rooms described, and then and there seized certain gaming apparatus and implements, (describing them,) "and your informant did also then and there seize certain furniture, fixtures and personal property, used as the furniture, fixtures and personal property of said rooms." *Held*, that the information showed that the furniture, fixtures and personal property were seized by virtue of the warrant. *Ib.*

4. Upon the filing of an information after the return of a warrant issued on a complaint under the Gen. Sts. *c.* 170, § 2, as amended by the St. of 1869, *c.* 364, § 3, praying for the condemnation of certain gaming apparatus and implements, the clerk issued an order "in accordance with the order of the court," directing a service by copy of the information and order upon the persons in whose possession the articles were found, and by posting up a copy of the order and information on the building, where the seizure was made, fourteen days before the hearing. The return of the officer showed that after diligent search he could not find the parties named, and that their usual places of abode were unknown to him, and that the notice was served by posting a copy, as directed, on the building. *Held*, that publication of notice in the public papers was not required, and that the notice given was sufficient. *Ib.*

See MUNICIPAL COURT OF THE CITY OF BOSTON.

GIFT.

In an action by the executor of A. for a bond lent by A. to the defendant, for which A. took a receipt, there was evidence that A. afterward, while

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sick in bed, made verbally a gift of it to the defendant, without any other delivery of the bond, and promised to return the receipt when he should be able to get it. The judge ruled that, upon the above evidence, as matter of law, there had been no sufficient delivery of the bond to constitute a valid gift, even if such was A.'s intention. *Held*, that this ruling was erroneous; and that the question whether there was such delivery was a matter of fact to be tried. *Hunt* v. *Hunt*, 474.

GOODS SOLD AND DELIVERED.

See EVIDENCE, 30.

GRAND JURY.

1. A grand jury in this Commonwealth may consist of not less than thirteen, nor more than twenty-three. *Crimm* v. *Commonwealth*, 326.
2. Under the Gen. Sts. *c.* 171, § 4, providing for the case of deficiency of grand jurors in any court, the court is authorized whenever the number of grand jurors in attendance is less than the full number of twenty-three, to cause so many additional grand jurors to be summoned as in its opinion, making due allowance for absences and excuses, may insure the filling up of the grand jury to that number; and the summoning of a greater number does not affect the validity of an indictment found by the legal number of jurors. *Ib.*
3. If grand jurors, after being sworn, are at once excused and never join the grand jury in their deliberations, they form no part of the grand jury by which an indictment is found. *Ib.*
4. On a writ of error to the Superior Court, it appeared by the record sent to this court, as amended on a writ of certiorari, that of the twenty-three grand jurors summoned, five were permanently excused; that a venire was thereupon ordered by the court to issue for seven additional grand jurors, six of whom appeared and were sworn, and two of them permanently excused, leaving a grand jury of twenty-two; that these with the seventh additional juror before summoned constituted the grand jury by which an indictment was found. *Held*, that the grand jury was properly constituted *Ib.*

GUARANTY.

The following instrument signed by the defendant was delivered to the plaintiff: "I guarantee the sum of five hundred dollars value in glass shades purchased by my son A. from B. Terms of purchase to be sixty days from date of invoice, and, if not paid within ninety days, draft to be drawn on me for the amount." *Held*, that it was not a continuing guaranty. *Held*, *also*, that parol evidence of the previous dealings, or of the dealings contemplated, between the creditor and the principal debtor; or that the guarantor had previously agreed to give the plaintiff a guaranty for future advances, and that the goods were sold relying on such guaranty; or that the relations of the principal parties were well known to the guarantor, was not admissible

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to show that the instrument was other than a guaranty of a single transaction. *Boston & Sandwich Glass Co.* v. *Moore*, 435.

HARBOR COMMISSIONERS.

See FLATS.

HEIR.

See WIDOW.

HORSE RAILROAD.

See EVIDENCE, 10.

HUSBAND AND WIFE.

Personal apparel furnished by a husband to his wife, or purchased by the wife, with the consent of her husband, with money given her by him from a fund formed by their joint earnings, remains the property of the husband, and the wife cannot maintain an action against a carrier for the loss thereof. *Hawkins* v. *Providence & Worcester Railroad*, 596.

See DEED, 1; INTOXICATING LIQUORS, 5, MARRIED WOMAN.

INCUMBRANCE.

See COVENANT, 1; DEED, 7.

INDICTMENT.

1. Where a count in an indictment charges two offences precisely alike, the fault is cured by the election of the prosecutor to proceed upon one charge only, and his entering a *nolle prosequi* as to the others. *Commonwealth* v. *Holmes*, 195.
2. An indictment on the Gen. Sts. *c.* 163, § 12, alleging the arrest for drunkenness of A., at a time and place mentioned, by B., a constable of the town, and that the defendant "did then and there unlawfully aid and assist the said A. in then and there unlawfully escaping from the said lawful custody of the said B.," is insufficient, although it follows the words of the statute. *Commonwealth* v. *Filburn*, 297.

See COMPLAINT; PERJURY, 1, 3.

INSANE PERSON.

See PAUPER.

INSOLVENCY.

See PARTNERSHIP, 3.

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INSURANCE.

I. *Life.*

1. In an action by the payee against the maker of a promissory note, it appeared that the plaintiff was an agent of a life insurance company. Evidence was admitted for the defence tending to show that the note was given for a policy of insurance in the company upon an agreement with the general agent of the company that the defendant should have sixty days to determine whether he would or would not be insured, and that, if within that time he should decide not to be insured, and should so notify the plaintiff, who was then present, the policy should be taken back and the note returned. *Held*, that this evidence was competent upon the issue whether there was a contract between the parties and a completed delivery of the policy and note under it. *Watkins* v. *Bowers*, 383.
2. In an action upon a promissory note given to the plaintiff as the agent of a life insurance company for a policy of insurance under an agreement that, if the defendant should within sixty days notify the plaintiff that he had decided not to be insured, the policy should be taken back and the note returned, evidence was put in by the defendant tending to show that during the sixty days he took the policy to the town where the plaintiff resided and endeavored to find him for the purpose of returning the policy to him. *Held*, that the testimony was competent to rebut any presumption of the defendant's acceptance of the policy arising from his inaction. *Ib.*

II. *Fire.*

3. A policy, issued by a mutual fire insurance company, insured the holder against loss or damage by fire under the conditions and limitations expressed in the rules of the company, and stated the undertaking of the company to be "to satisfy and make good, from the absolute and conditional funds of the company, unto the said assured, all the damage by fire which may happen to said real estate, within the term aforesaid, according to the true intent and meaning of said rules. Provided, nevertheless, that if the whole of the absolute and conditional funds of said company shall be insufficient to pay and satisfy all damages that may happen, in such case a just average shall be made to the sufferers, and the payment to be demanded in virtue of this policy shall be a dividend of said stock, in proportion to the sum insured and the rate of damage." One rule required notice of a loss to be given in a prescribed manner, and provided that "payment shall be made in thirty days after receiving notice of the loss as above." Another rule provided that "in case losses should happen so as to absorb the whole of the absolute fund, the president and directors shall, within twenty days, proceed to assess on each member a sum not exceeding double the amount by him paid by way of premium and deposit, and the same assessment publish in two or more newspapers in Boston. They shall then collect the said assessment without delay; and in thirty days after such notice shall have been given, they shall actually proceed in due form of law against each delinquent, and

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thereby be completely exonerated. In case of neglect, they may be subjected to the penalty expressed in the act of incorporation. In case of neglect to pay said assessment, such delinquent's policy or policies shall cease and determine until payment is made, with interest, and such reasons given for the delay as shall be satisfactory to the president and directors." *Held*, that after losses which absorbed the absolute funds of the company and required an assessment upon the contingent liability of the members, the insured who had sustained losses were not entitled to interest thereon out of the surplus remaining from the assessments after the payment of the losses. *Commonwealth* v. *Massachusetts Ins. Co.* 45.

4. A mutual fire insurance company is not liable for any loss which occurs after the appointment of receivers and the judicial sequestration of all its property; and where, upon the happening of losses which absorb the absolute fund of the company and require an assessment upon the contingent liability of the members, the fund accruing from the assessment is more than enough to pay for the losses, the receivers are not entitled to retain any part of the surplus for the purpose of meeting future losses. *Ib.*

5. Where the losses upon policies issued by a mutual fire insurance company are so large as to exhaust the absolute fund of the company, and an assessment is made in accordance with the rules of the company, upon the contingent liability of the members, which proves to be more than sufficient to pay the amount required, the surplus is, in the absence of any requirement in the rules of the company that it shall be devoted to other uses, to be repaid to the members by whom the assessment was paid. *Ib.*

6. A policy of insurance against fire which contains a provision that if the assured "shall have made or shall hereafter make any other insurance upon said property without the knowledge or consent of this company, in writing, then in such case this policy shall be void," is not defeated by the taking of a subsequent policy which is invalid by reason of the failure of the assured to obtain the assent of the company issuing it to the existence of other insurance upon the property as required by the terms of that policy, and the assured may set up the invalidity of the second policy, in an action by him upon the first policy, although he has received payment of the second policy from the insurer. *Thomas* v. *Builders' Ins. Co.* 121.

7. Where a building is insured against fire by a policy which provides that "if the assured shall vacate the property in whole or in part, this policy shall be void; this company will not insure unoccupied property," and an indorsement is made upon the policy by which it is to be payable in case of loss or damage to mortgagees of the insured property "as their mortgage claim may appear," and the property is afterwards destroyed by fire, when unoccupied, the policy is void, both as to the original assured and the mortgagees. *Franklin Savings Institution* v. *Central Ins. Co.* 240.

8. A policy of insurance against fire, which provided that it should be void if any change took place in the title or possession of the property, whether by sale, transfer or conveyance, legal process or judicial decree, was made to the owner of an equity of redemption, payable in case of loss to the "mort-

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gagee, as his interest may appear." The mortgagor afterwards conveyed his interest in the premises by quitclaim deed to the mortgagee, and at the same time took back a bond for a reconveyance of the same to him, his heirs and assigns, upon the payment of a sum named, which was the amount then due on his mortgage. The bond was not acknowledged or recorded, and the insurer had no notice of the existence of either the deed or the bond until after the premises were destroyed by fire. After the delivery of the deed and bond, and until the fire, the mortgagor occupied a part of the building without payment of rent, paid taxes, made repairs, controlled the occupation of the other tenants, and until four months before the fire collected the rents and paid them over to the mortgagee. After that the mortgagee collected the rents, but had nothing else to do with the premises. The debt secured by the original mortgage had not been paid. The mortgagee brought an action to recover for the loss by fire. *Held*, the Gen. Sts. *c.* 89, § 15, providing that an absolute conveyance shall not be defeated or affected by an unrecorded defeasance "as against any person other than the maker of the defeasance or his heirs or devisees, or persons having actual notice thereof," that there was an alienation within the meaning of the policy. *Foote* v. *Hartford Ins. Co.* 259.

III. *Marine.*

9. The right to recover for a constructive total loss, on abandonment of a vessel to the underwriters, depends upon the state of facts when the abandonment is made; and the abandonment, if justified by those facts, relates back to the time of the loss. *Snow* v. *Union Ins. Co.* 592.

10. If a vessel is once totally lost by a peril insured against, and the master, using due diligence, is unable to regain possession of her in such a condition and under such circumstances as to enable her to pursue the voyage for which she is insured, the right to abandon and to recover for a constructive total loss remains, without regard to the question whether at some future time, over which the master has no control, he might be able to regain possession of her on payment of salvage, and without regard to the proportion between the amount of the salvage and the value of the vessel. *Ib.*

11. In an action on a policy of marine insurance, there was evidence that the vessel insured, a whaling vessel, was jammed fast in the ice in the Arctic Ocean, with no open water in sight and drifting northwards with the current; that her officers and crew, finding it impossible to extricate her with the utmost efforts, and being nearly worn out with fatigue and want of sleep, in order to save their lives, left her in their boats, taking with them their guns and whaling gear, and, by passing through narrow strips of water, and hauling the boats over the ice, reached the whaling fleet in safety, fifty miles south of where they left the vessel; that ten days afterwards, the men, boats and guns being scattered in different vessels, and some of them having gone home, the ice loosened, and the abandoned vessel was got out by the master and crew of another vessel, and held for salvage; that the master of the vessel insured was not able, by the exercise of reasonable efforts, to obtain

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a sufficient crew or whaling craft, or to gain possession of the vessel to pursue the voyage on which she was employed, and for which she was insured; that the vessel was taken by the salvors to San Francisco, and before her arrival there was abandoned by her owners to the underwriters. *Held*, that it was competent for the jury to find a verdict against the underwriters for a constructive total loss. *Snow* v. *Union Ins. Co.* 592.

12. Under a declaration on a policy of marine insurance for a total loss, a constructive total loss may be recovered. *Ib.*

13. It is not necessary, in a declaration on a policy of marine insurance, to allege the abandonment of the vessel to the underwriters, or the facts necessary to constitute the total loss relied on. *Ib.*

INSURANCE COMPANY.

See EQUITY, 1.

INTEREST.

See CERTIORARI, 4; DAMAGES, 1; INSURANCE, 3; SHIP, 9; WAY, 5.

INTOXICATING LIQUORS.

1. At the trial of a complaint under the Gen. Sts. *c.* 87, §§ 6, 7, for keeping and maintaining on May 1, 1875, and on divers other days between that day and September 27, 1875, a tenement for the illegal sale of intoxicating liquors, a witness for the government testified that a few days before the trial, which was at October term 1875, the defendant told him that a card which the witness produced and upon which were printed the defendant's name and address, and the words, "Dealer in imported wines and liquors," "Porter" and "Lager Beer," was her card, and that she had the card printed about a year before. *Held*, that the witness was rightly permitted to read the card for the purpose of showing that the defendant was keeper of the tenement on May 1, 1875. *Commonwealth* v. *Twombly*, 104.

2. Under the St. of 1875, *c.* 99, § 12, authorizing the mayor and aldermen of a city, by whom a license to sell intoxicating liquors has been issued, to declare a license forfeited upon proof satisfactory to them of a violation of its conditions, after notice to the licensee and reasonable opportunity for him to be heard by them, a licensee cannot be convicted of selling intoxicating liquors in violation of law upon the production of the record of the board of aldermen, showing only that before the sale the board declared his license "revoked," and parol evidence that the licensee was heard upon a charge of having sold intoxicating liquor on the Lord's day, and upon the question of revocation. *Commonwealth* v. *Moylan*, 109.

3. On the trial of a complaint under the St. of 1875, *c.* 99, charging the defendant with unlawfully exposing and keeping intoxicating liquors with intent to sell the same in this Commonwealth, the defendant requested an instruction to the jury that the burden of proof was on the government to prove that the liquors exposed and kept for sale were intoxicating, and that

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the jury must acquit if the evidence left them in doubt as to that fact. The judge gave this instruction with the modification that if the liquors exposed were ale, or distilled spirits, called whiskey, they must convict, if the same were kept for sale. *Held*, that the modification was correct. *Commonwealth* v. *Curran*, 206.

4. At the trial of a complaint for the sale by the defendant of intoxicating liquors in violation of law, evidence that the defendant's son sold intoxicating liquors to the person named in the complaint in a public house kept by the defendant, and in which his son was clerk, is sufficient evidence to be submitted to the jury of a sale by the defendant, and to warrant a conviction. *Commonwealth* v. *Holmes*, 195.

5. If a married woman keeps intoxicating liquors for sale in violation of law in a house which she and her husband own jointly, the husband will be liable for such illegal keeping, if he has knowledge of the fact, and of her intent, although he has no interest in the stock in trade or in the profits. *Commonwealth* v. *Kennedy*, 211.

See APPEAL, 6; COMPLAINT, 1, 2, 4; CONSTITUTIONAL LAW; EVIDENCE, 1; PLEADING, 7.

JOINT CONTRACT.

See CONTRACT, 1.

JUDGMENT.

1. A judgment of a court of general jurisdiction in another state may be proved by a duly certified copy of the "transcript of judgment," which simply contains a copy of the summons to the defendant to answer in a plea of trespass on the case in assumpsit; a return of the officer thereon, showing personal service on the defendant; a copy of the plaintiff's declaration and statement of his claim; a copy of the "continued docket entry," showing, under the names of the parties, the issuing of the summons, filing of the plaintiff's declaration and statement, and entry of judgment; and a copy of the "judgment docket entry," showing, under the names of the parties, the date of the judgment, the amount of the debt, and the amount of the costs. *Brainard* v. *Fowler*, 262.

2. In an action on a judgment obtained in another state, in which the record shows that the defendant was duly summoned to appear, evidence that the defendant did not owe the plaintiff anything is not competent on the issue whether service was made on the defendant, nor on the issue whether the claim in the other state was fraudulent; and the evidence is not made admissible by the fact that the officer, who appeared by the record to have made the service, testified that when he made the service the defendant said the claim was a just one. *Ib.*

See BANKRUPT, 2; EXCEPTIONS, 2; SET-OFF; STATUTE, 2.

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JURISDICTION.

Under the St. of 1873, *c.* 261, providing that application for a jury may be made by petition to the Superior Court, in all cases in which it is provided by law that a sheriff's jury may be had, the tribunal to which the first application is duly made acquires exclusive jurisdiction of the subjectmatter. *Miller* v. *County Commissioners*, 485.

See BANKRUPT, 1; EQUITY, I.; SUPREME JUDICIAL COURT; TRUST AND TRUSTEE; WAY, 9.

JURY.

See GRAND JURY.

LANDLORD AND TENANT.

See FISHERY, 4; LEASE, 1, 2.

LARCENY.

On the trial of an indictment for larceny of railroad tickets, the property of a railroad corporation, the government introduced evidence that five packages of tickets, containing one hundred each, belonging to the railroad corporation, and numbered in regular succession from 1 to 500, were placed in the hands of its ticket-agent; that soon after one of these packages, containing tickets numbered from 200 to 300, was found to be missing, and that two tickets identical in appearance and general description with those contained in the missing package, and numbered as they should have been if contained in that package, were found in the possession of the defendant. There was also evidence that the defendant said that he bought those tickets of the ticket-agent, who denied this. *Held*, that on this evidence the jury were warranted in returning a verdict of guilty. *Commonwealth* v. *Randall*, 107.

LAW AND FACT.

1. A. agreed in writing, for a round sum, to move a house, do certain work upon it, and "to finish said house ready for occupancy." In an action by A. on this contract, it was admitted that if the contract required A. to build a water-closet, he had not completed the contract. *Held*, that the court could not say, as a matter of law, that the omission of a water-closet was a failure to perform the contract; and that it was a question of fact for the jury to determine whether the building of a water-closet was reasonably necessary and proper to make the house ready for occupancy. *Cunningham* v. *Washburn*, 224.

2. In an action upon a contract under seal, by which a builder agreed with two owners of a house to move it, and "dig and stone a cellar to set it on," it is a question of fact for the jury whether the use of new stones in building the cellar wall, which were ordered by one owner, was assented to or ratified by the other. *Ib.*

See MECHANIC'S LIEN; NEGLIGENCE; PAYMENT, 1, 2.

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LEASE.

1. If land is taken under the St. of 1868, *c.* 277, which authorizes the city of Boston, to take lands in a certain district, for the purpose of abating a nuisance, and provides that "the title to all lands so taken shall vest in the city," the liability of a lessee of such land to pay rent to his lessor ceases on such taking, without any eviction by, or attornment to, the city. *O'Brien* v. *Ball*, 28.

2. Land in Boston was leased for a term of years, and, while the lease remained in force, the land was taken by the city to abate a nuisance, under the St. of 1868, *c.* 277, which provides that "the title to all lands so taken shall vest in the city;" the lessee continued in possession, and for some time paid rent to his lessor, both parties acting in the belief that the lease continued in force. Afterwards, the lessee being told that he was liable to be held to pay rent to the city, refused to pay rent under the lease. *Held*, in an action by the lessor, on the Gen. Sts. *c.* 137, § 5, to recover possession of the premises, that the judge, who tried the case on the above facts, was warranted in finding that no new tenancy, between the lessor and lessee, was created, and in rendering judgment for the defendant. *Held*, *also*, that the fact that after the action was begun the city reconveyed the land to the lessor did not affect the case. *Ib.*

3. A lease of a dwelling house for five years provided that the lessor might terminate the lease by notice, and that, if this was done during the first three years of the term, the lessee should be paid such sum as a compensation for the loss he may "by such abridgment of the term sustain in consequence of expenditures incurred by the lessee in fitting up the premises, and expenses incurred in removing." In an action by the lessee to recover for expenses incurred by him in fitting up the premises, the lease having been terminated by notice within the three years, it appeared that, at the time the lease was made, the building was in thorough repair; but the lessee made some changes in it, and furnished it. *Held*, that the term "fitting up the premises" included not only the fitting up of the building and premises to the uses of the lessee, but the fitting of his furniture to the building, such as carpets, window curtains and the like. *Held*, *also*, that the measure of the lessee's damages was the loss sustained by reason of his having incurred such expenditures the full benefit of which he had lost by the abridgment of his lease, and not the entire cost of fitting up. *Pratt* v. *Paine*, 439.

See DAMAGES, 2; EVIDENCE, 16, 22; EXCEPTIONS, 20; FISHERY, 4 PLEADING, 7; PROMISSORY NOTE, 3.

LICENSE.

See CONSTITUTIONAL LAW; INTOXICATING LIQUORS, 2.

LIEN.

See COVENANT, 1; MECHANIC'S LIEN; SHIP, 3–9.

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LUNATIC.

See PAUPER.

MALICIOUS PROSECUTION.

1. The declaration in an action for a malicious prosecution contained a count for the abuse of the process of the court in suing out the writ, and a count for an assault and battery in causing the officer to make an arrest of the present plaintiff under said writ. At the trial it appeared that the writ upon which the plaintiff was arrested was in due form and issued from a court of competent jurisdiction, and that the arrest was made by the officer within the scope of his authority; that after the present action was brought, and before the entry of that action, it was agreed to enter "neither party" in that action, and the writ was never returned into court. *Held*, that the cause of action, however stated in the declaration, was in substance and legal effect for malicious prosecution; and that the action was prematurely begun. *Hamilburgh* v. *Shepard*, 30.

2. In an action of tort by a husband and his wife for a malicious prosecution of the wife, it appeared that the defendant made a complaint on oath before a trial justice, accusing the wife of larceny, and the husband of inciting and commanding the wife to the crime, and praying for the arrest of the husband; that the warrant was for the arrest of the husband only; that both were brought from another state on a requisition from the governor of this Commonwealth, and were arrested and brought before the justice; that the wife was required to plead to the complaint, to answer further thereto at a subsequent day, and to give surety for her appearance for that purpose, and in default of bail was committed to jail, and on the day fixed for the trial was discharged, being found by the magistrate to be not guilty. The jury were instructed that the making of the complaint did not of itself render the defendant liable for the subsequent arrest and imprisonment of the wife; but that if he intended and participated in her arrest and imprisonment upon the complaint, the requisition or the warrant, he was, if and so far as her arrest and imprisonment were caused by such acts of his, done with malice and without probable cause, liable in damages therefore in this action. *Held*, that the action could be maintained as for malicious prosecution, and that the instructions were correct. *Gibbs* v. *Ames*, 60.

MARRIED WOMAN.

1. Where a wife, whose husband has left the Commonwealth and remained absent therefrom, is sued as a *feme sole*, upon a debt afterwards contracted by her, the burden of proof is on the plaintiff to establish her liability. *Kendall* v. *Jennison*, 251.

2. A husband left the Commonwealth, remained absent therefrom, and six years after obtained a decree of divorce from his wife, for desertion, from a court of competent jurisdiction in the state where he then resided, and after due notice to her. The wife was afterwards sued, as a *feme sole*, for

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debts contracted after the husband's departure, and for others contracted after the divorce, and the case was submitted to the court upon an agreed statement of facts, with a provision that the court might draw such inferences from the facts as a jury might draw. There was some evidence tending to show an intentional abandonment of the wife by the husband at the time of his departure, but the wife did not appear in the divorce suit against her, and it did not appear that she made any objection to it. *Held*, that this court could not say, as matter of law, that the court below was not justified in finding as a fact that, up to the time of the divorce, there had been no such abandonment by the husband as would entitle the wife to be treated as a *feme sole*, and that she was liable for all debts contracted after the divorce. *Kendall* v. *Jennison*, 251.

See INTOXICATING LIQUORS, 5.

MASTER AND SERVANT.

1. A servant, who by his contract of hiring agrees that if he intends to leave his master's employ, he will give notice of such intention, and work ten full working days thereafter, and, in default thereof, forfeit all money that may be due him, may recover from the master wages previously earned, if he is kept from his work by sickness, gives reasonable notice thereof to the master, and is absent only so long as he is so disabled. *Harrington* v. *Fall River Iron Works Co.* 82.

2. A laborer who has assented to a regulation of his employer providing that "all persons intending to leave are required to give two weeks' notice of such intention to the overseers of their respective rooms, and no person will be considered honorably discharged or entitled to wages then due unless this regulation is complied with," cannot maintain an action to recover for his labor if he has left his work without giving the required notice, although the defendant is not restrained from dismissing the plaintiff without notice. *Preston* v. *American Linen Co.* 400.

3. In an action by a laborer who worked under no express contract, and was engaged for no definite time, to recover for his services to his master, it appeared that the plaintiff had been in the defendant's employ fourteen months, and that he had regularly received his pay in an envelope on which was printed a regulation of the defendant, providing that "all persons intending to leave are required to give two weeks' notice of such intention to the overseers of their respective rooms; and no person will be considered honorably discharged or entitled to wages then due unless this regulation is complied with." It did not appear that the plaintiff knew of this regulation when he commenced the work, but he testified that he read it soon after, and knew of it "about all the time he was in the defendant's employ." *Held*, that it was rightly submitted to the jury as a question of fact whether the plaintiff assented to be bound by the regulation, and that they were rightly permitted to consider the fact that, after knowledge of it, he continued to work as before. *Ib.*

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4. A railroad corporation is not liable to a road master in its employ for an injury sustained by him while riding in one of its cars, which is thrown down a bank by the breaking of a switch on its road, in the absence of evidence that there was any negligence in procuring a proper switch, or any defect in the switch which could have been discovered upon the most careful inspection, or that the switch was intended, or could reasonably have been expected, to hold the cars upon the tracks, which were driven at unreasonable speed, or of other evidence of negligence for which the corporation would be liable. *Ladd* v. *New Bedford Railroad*, 412.

5. A railroad corporation is not liable to an employee for an injury sustained by him while riding in one of its cars, which is thrown from the track, on the ground that the cars were imperfect by the want of check-chains, if he was of the opinion that cars without check-chains were dangerous, and knew that some of the defendant's cars were not provided with check-chains, and did not notice, until after the accident, whether the car in which he was riding had check-chains or not. *Ib.*

6. A brakeman in the employ of a railroad corporation cannot maintain an action against the corporation for personal injuries, caused by the making up of a train of cars, with platforms of unequal height, by the ordinary servants of the corporation, under the direction of one of its station masters. *Hodgkins* v. *Eastern Railroad*, 419.

MAXIM.

Qui tacet consentire videtur. See *Day* v. *Caton*, 513, 515.

MEADOW AND LOW LANDS.

The words, "greater part of them in interest," in the Gen. Sts. *c.* 148, § 2, providing that the proprietors of meadow and swamp lands, "or the greater part of them in interest," may apply by petition to the Superior Court for the improvement of the lands, relate to the proprietors having the greatest interest in value, and not to those owning the largest territorial area. *Henry* v. *Thomas*, 583.

MECHANIC'S LIEN.

1. Upon the trial of a petition to enforce a mechanic's lien, the question whether the certificate required by the Gen. Sts. *c.* 150, was filed within thirty days after the work was completed or materials furnished under the contract, or whether work was done within the thirty days colorably, for the purpose of reviving the lien, is a question of fact, upon which the finding of the judge, who tries the case without a jury, is final. *Turner* v. *Wentworth*, 459.

2. On the trial of a petition to enforce a mechanic's lien, the question whether labor was performed and materials furnished by the petitioner upon each of three houses in a block under an entire contract, or under separate contracts, is a question of fact, upon which the finding of the judge, who tries the case without a jury, is final. *Ib.*

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3. On the trial of a petition to enforce a mechanic's lien, the petitioner claimed a lien for furnaces and ranges furnished by him. The judge who tried the case without a jury found that the petitioner was entitled to the lien. *Held*, that the question was one of mixed fact and law: that if the transaction between the petitioner and the owner of the buildings was merely a sale of the furnaces and ranges as personal property, there would be no lien; but if by the contract the furnaces and ranges were to be furnished as parts of the houses, and they were in fact so applied, there would be a lien; and that, it not appearing that the judge erred in applying these principles of law, exceptions alleged to his finding could not be sustained. *Turner* v. *Wentworth*, 459.

See SHIP, 3–9.

MEMORANDA.

Death of Mr. Justice Metcalf, 600.
Death of Mr. Justice Wells, 167, 605.
Appointment of Mr. Justice Lord, 354.

MILL.

See WAY, 9.

MISNOMER.

See COMPLAINT, 3.

MISTAKE.

See MONEY PAID.

MONEY PAID.

If in a settlement of mutual accounts one party thereto allows, without being induced by fraud, a certain sum by way of compromise of a doubtful claim, he cannot recover it back; but if he pays it relying upon erroneous vouchers produced by the other party at the time of the settlement, he may, even if there was no fraud, recover it back as money paid by mistake. *Stuart* v. *Sears*, 143.

MORTGAGE.

I. *Of Real Estate.*

1. On a bill in equity, filed January 8, 1874, to redeem a mortgage, it appeared that on a writ of entry to foreclose the mortgage, an execution for possession issued dated May 6, 1869, upon a conditional judgment; that the officer's return and the acknowledgment of possession were dated May 3, 1869; and that the execution was recorded June 10, 1869. *Held*, that the date of the officer's return was not conclusive as to the actual date of the possession; and it appearing from the whole record, without resort to other evidence, that possession was actually taken on some day after the execution was issued and before June 10, that this was enough to commence the foreclosure as of the latter date. *Worthy* v. *Warner*, 550.

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2. The assignee of a judgment and execution for the foreclosure of a mortgage, under which possession had been taken, advanced to one of the owners of the equity, who was the guardian of the other owners, who were minors, a further sum, taking his note with sureties for the amount of the mortgage debt and the additional sum, and giving him a written agreement to cancel and assign to him the judgment, if he should pay the note with interest at its maturity, but not otherwise. The note was paid before its maturity by the sureties, and the judgment was assigned to them after the lapse of three years from the time possession was taken. *Held*, on a bill in equity to redeem, that there had been no payment of the mortgage debt or waiver of the foreclosure. *Worthy* v. *Warner*, 550.

See COVENANT, 2–4; DEED, 3; INSURANCE, 7, 8; PROMISSORY NOTE, 1.

II. *Of Personal Property.*

3. Goods in the possession of a mortgagee were attached as the property of the mortgagor under the Gen. Sts. *c.* 123, § 67, and the mortgagee summoned as trustee. The goods were then sold by the attaching officer as perishable property under the Gen. Sts. *c.* 123, §§ 73–77, and the proceeds of the sale, after deducting the expenses thereof, were less than the amount of the mortgage, though the market value of the goods at the time of the attachment was greater than the mortgage. After the sale the attaching creditor discontinued against the trustee. *Held*, in an action of tort by the mortgagee against the attaching officer, that the Gen. Sts. *c.* 123, § 67, applied only to an attachment of goods in the possession of the mortgagor; that the attachment was void; that the attaching creditor could not by a discontinuance against the trustee turn the attachment into one under the Gen. Sts. *c.* 123, § 62; that the officer was a trespasser *ab initio*, and liable for the amount of the mortgage debt. *Porter* v. *Warren*, 535.

See SHIP, 1.

MOTION TO DISMISS.

See COMPLAINT, 3.

MUNICIPAL COURT OF THE CITY OF BOSTON.

The Municipal Court of the city of Boston has jurisdiction to forfeit and order to be sold the furniture, fixtures or personal property seized in a gaming-house on a search warrant issued from and returned to that court, under the Gen. Sts. *c.* 170, §§ 1–5, and the St. of 1869, *c.* 364, at a time when persons were there found playing an unlawful game. *Commonwealth* v. *Gaming Implements*, 332.

MUTUAL FIRE INSURANCE COMPANY.

See INSURANCE, 3–5.

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NEGLIGENCE.

1 In an action to recover for injuries caused by the collision of the plaintiff's carriage with that of the defendant, it is a question of fact for the jury whether the plaintiff, in the exercise of ordinary care, could, by stopping or turning out, have avoided the collision, and whether his failure to do so contributed to the injury. *Hall* v. *Ripley*, 135.

2. In an action to recover for personal injuries sustained by a man by being struck by a wagon while crossing a street in a city, at eleven o'clock in the forenoon, it appeared that the street was sixteen feet wide, and that a person could see the whole length of the street. The plaintiff testified that his eyesight was good; that he looked and did not see the wagon, or hear it, until he was struck. A witness for the plaintiff testified that he was about twenty-five feet from the plaintiff, heard some one halloo and the rattle of a wagon, and turned and saw the wagon hit the plaintiff, who was then but a few steps in the crossing. The defendant testified that he saw the plaintiff and hallooed to him before he left the sidewalk, and when he was about fifteen feet from him; that the plaintiff turned and looked around, and undertook to run across. *Held*, that whether the plaintiff was in the exercise of due care was a question of fact for the jury. *Carland* v. *Young*, 150.

See ACTION, 1, 2; EXCEPTIONS, 21; MASTER AND SERVANT, 4–6; WAY, 14–16, 18.

NEW TRIAL.

Where, in an action against a city to recover for injuries occasioned by a defective highway, the issues are whether the defect had existed for twenty-four hours, and whether the city had notice of the defect, and the jury find specially that the defect had existed for twenty-four hours, and return a general verdict for the plaintiff, it is within the power of the judge to set the special finding aside, and to permit the general verdict to stand. *Means* v. *Lynn*, 273.

See EXCEPTIONS, 10, 16.

NOLLE PROSEQUI.

See INDICTMENT, 1.

OFFICER.

See ATTACHMENT, 2.

OFFICER DE FACTO.

See CONSTABLE.

ORDINANCE.

See SALE; WAY, 14.

PARTIES TO ACTION.

See PLEADING, 1.

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PARTNERSHIP.

1. A partnership is liable to the holder of a promissory note made by one member of the firm, in its name, if the holder has no actual knowledge, suspicion or cause of suspicion of any fraud upon the partnership in the making of the note. *Blodgett* v. *Weed*, 215.

2. If a promissory note, signed by one member of a partnership in the firm name, is given in payment of debts, some of which were contracted before another member came into the firm and the rest thereafter, and an action thereon by the payee of the note is defended by such other member alone, the plaintiff, in the absence of evidence of actual fraud on his part, or of knowledge when the party defending entered the partnership, is entitled to recover for such debts covered by the note as were contracted after he became a member. *Guild* v. *Belcher*, 257.

3. Articles of copartnership between C., W., B. and S., for the transaction of a commission business, provided that C. and W. should contribute the whole capital in unequal proportions; that C. should contribute "such time as he may be able to give;" that W., B. and S. should each contribute all their time to the business; that each partner should receive one fourth of the net profits; and that C. and W. should receive interest on the capital contributed by them. The partnership was afterwards dissolved by mutual consent, the business of the firm closed by W., and it resulted in a loss. *Held*, on a bill in equity by W. against the other partners, that the capital constituted a debt of the partnership to which all the partners were bound to contribute equally, and that, one of them being insolvent, the loss was to be borne equally by the other three. *Whitcomb* v. *Converse*, 38.

PARTY WALL.

See CONTRACT, 2, 5.

PATENT.

See EQUITY, 2.

PAUPER.

In an action under the Gen. Sts. *c.* 73, § 25, by a town, for expenses paid for the support of a lunatic committed to a state hospital, against the town where he has a settlement, the plaintiff must show that the lunatic was a pauper at the time the relief was furnished. *Waltham* v. *Brookline*, 479.

PAYMENT.

1. In an action upon a promissory note against the maker, it appeared that, after the note matured, an arrangement was made by which a new note for the same amount was given, signed by the indorsers of the note in suit, and the issue was whether the new note was given in payment of the note in suit or as collateral security for it. One of the indorsers was an attorney at law, and was called as a witness by the plaintiff. Upon cross-examination

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it appeared that he had aided the plaintiff in the proceeding taken to enforce the note in suit against the defendant. *Held*, that the significance of the witness's acts, as evidence of payment, was for the jury; and that the judge rightly refused to rule, as requested by the plaintiff, that the fact that the witness aided in collecting the note was no evidence of its payment. *Connecticut Trust Co.* v. *Melendy*, 449.

2. In an action upon a promissory note against the maker, it appeared that, after the note matured, an arrangement was made by which a new note for the same amount was given, signed by the indorsers of the note in suit, and the issue was whether the new note was given in payment of the note in suit or as collateral security for it. The new note was given in another state, by the law of which the giving of a promissory note was not presumed to be in payment of a preëxisting debt. *Held*, that it was a question of fact for the jury, upon the circumstances of the case, whether the fact that the new note was credited upon the books of the holder was evidence of payment. *Held*, *also*, the plaintiff having requested an instruction that the presumption of law is that the holder did not intend to accept the note in payment and to discharge the maker of the note in suit, and unless the jury find that a distinct agreement was made to accept the note in payment, they cannot find that it was accepted in payment, and, the instruction being given in substance, though not in the words requested, that the plaintiff had no ground of exception. *Ib.*

3. In an action upon a promissory note against the maker, it appeared that, after the note matured, an arrangement was made by the agent of the indorsers, by which a new note for the same amount was given, signed by the indorsers of the note in suit, and the issue was whether the new note was given in payment of the note in suit or as collateral security for it. The new note was given in another state, by the law of which the giving of a promissory note was not presumed to be in payment of a preëxisting debt. The plaintiff requested the judge to instruct the jury that, unless the indorsers intended to give their note in payment of the note in suit, it would not be a payment. The judge declined to give this instruction, and instructed the jury that the transaction at the time the new note was given is not only to be considered with regard to what the indorsers did and intended to do about it; if the plaintiff, who was the real creditor, chose to receive it and did receive it as payment and surrendered the note in suit, gave it up and received that in payment, then it was a payment. *Held*, the judge having previously instructed the jury that the defendant must prove an agreement between the parties that the new note was to be taken as payment of the old one, that the plaintiff had no ground of exception. *Ib.*

See MORTGAGE, 2; PRINCIPAL AND AGENT, 1; TRUSTEE PROCESS, 6.

PERJURY.

1. An indictment against B. for perjury, alleged that on March 25, 1875, at Boston, in the county of Suffolk and Commonwealth of Massachusetts, C. "was brought before the Municipal Court of the City of Boston, holden at

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said Boston for the transaction of criminal business, upon a complaint in due form of law," charging him with perjury; that the further consideration of said complaint was continued until the sixth day of April next ensuing; and that on said sixth day of April, said C. "being lawfully before said Municipal Court, it was lawfully ordered by said Municipal Court" that C. recognize with sureties, and that he be committed until he should so recognize, and that on the ninth day of said April, at Boston aforesaid, before one A., a commissioner within and for said county of Suffolk, legally authorized, and duly appointed and qualified to take bail in criminal cases in said county, B. offered himself as bail and surety in such recognizance for said C.; that B. was then and there lawfully required by said commissioner — pursuant to the course and practice of taking and approving bail — to make a written statement under oath of his, said B.'s, circumstances and property, the same being material to aid said commissioner in determining whether he would and should take and approve said B. as his bail and surety; that said B., being then and there duly sworn to the requirement aforesaid, did then and there, in pursuance of said requirement, make said statement, and did then and there, being so sworn as aforesaid, falsely, wilfully, knowingly and corruptly say, depose and swear (in and by said written statement) as follows. The indictment then set forth the statement signed by B., and entitled "Commonwealth of Massachusetts, Suffolk, ss. Before A., a commissioner duly authorized to take bail in criminal cases in said county." *Held*, that if it was necessary under the St. of 1860, *c.* 186, § 1, to allege that the court had jurisdiction of the case of B., the fact was sufficiently alleged. *Held*, *also*, that the indictment duly alleged before whom the oath was administered to B. with sufficient allegations of the time and place thereof. *Commonwealth* v. *Butland*, 317.

2. The statements under oath, of a person offering himself as bail, as to the value of his property, are material, and if they are wilfully and corruptly false, he is liable to conviction for perjury. *Ib.*

3. An indictment for perjury averred that the defendant stated under oath that certain land was of the cash value of not less than five thousand dollars, whereas it was of trifling value, to wit, ten dollars in all. At the trial there was some evidence that the land was of the value of eighteen hundred dollars. The defendant asked the judge to rule that the variance between the allegation and proof was fatal. The judge declined so to rule, and instructed the jury that it was not necessary for the government to prove that the true value of the property did not exceed ten dollars, but it must prove that its value was not what was stated by the defendant, and that he, knowing its value was less than stated by him, intentionally misstated its value. *Held*, that the defendant had no ground of exception. *Ib.*

4. On the trial of an indictment for perjury, the issue being whether the defendant had knowingly falsely sworn that he had land in a certain town worth $5000, the evidence on the part of the government was the testimony of one witness who put the value at $1800, and the deed of the land to the defendant, made six months before, which stated the consideration to be

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$2800; and there were other issues to be submitted to the jury involving the question whether the defendant had sworn falsely. *Held*, that the testimony of the witness was supported by corroborating circumstances sufficient to justify the submission of the issue to the jury. *Commonwealth* v. *Butland*, 317.

5 On the trial of an indictment for perjury, the issue being whether the defendant had knowingly falsely sworn that he had personal property to the amount of $1285, consisting of stock in a grocery store in a certain town, two witnesses testified that he had no such store in the town. Two other witnesses testified that the defendant made admissions to them to the same effect. *Held*, that the issue was rightly submitted to the jury. *Ib.*

6. On the trial of an indictment for perjury, the issue being whether the defendant had knowingly falsely sworn on December 11, 1874, that his liabilities did not exceed $500, and that he was worth not less than $20,000 over and above all liabilities, there was evidence that the defendant went into bankruptcy in 1872, and that his schedules under oath showed debts to the amount of $85,000; that he had not received a discharge, and no dividend had been paid. *Held*, that this evidence, unexplained and uncontrolled by evidence that the defendant had since paid the debts or acquired property, was properly submitted to the jury. *Ib.*

7. An indictment alleging that the defendant committed perjury in an examination touching the amount of his property, upon his offer to be bail for one who had been committed to jail on a criminal charge, by falsely swearing that he had personal property at Gloucester, in the county of Essex and Commonwealth of Massachusetts, is supported by proof that he swore to a written statement that he had personal property at Gloucester, in the county of Essex, there being proof of facts to show that the statement could apply, and was intended to apply to Gloucester, in the county of Essex and Commonwealth of Massachusetts, and that he had no property there. *Ib.*

8. On an indictment for perjury, the issue being whether the defendant had falsely sworn that he owned land in a certain town of the value of $5000, it appearing that the deed to him of the land was signed by A. and his wife in her right, A. was permitted to testify, against the defendant's objection, that the defendant paid nothing to him for the land. *Held*, that the evidence was admissible. *Ib.*

See RECOGNIZANCE.

PILOT.

See SHIP, 2.

PLEADING.

I. *Parties to Action.*

1. The assignment by the payee of a promissory note of all his right therein, without any indorsement, does not prevent the maintenance of an action upon the note in the name of the payee. *Tucker* v. *Tucker*, 79.

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2. Where a person, answerable in contract to two jointly, settles with one of them so that that one has no longer any real interest in the matter in dispute, it is a severance of the cause of action, and the debtor is liable in an action at law to the other alone. *Boston & Maine Railroad* v. *Portland, Saco & Portsmouth Railroad*, 498.

3. Where A., answerable in contract to B. and C. jointly, makes an agreement with B., by which B. agrees to pay, release and discharge all A.'s debts, and to indemnify him against all demands, such agreement puts an end to all real interest of B. in the claim of B. and C., and C. may maintain an action at law alone against A. *Ib.*

See EXECUTOR AND ADMINISTRATOR, 1; HUSBAND AND WIFE.

II. *Declaration.*

1. A. and B., owners of adjacent lands and buildings, made a contract whereby B. agreed to make certain alterations in the roof of A.'s building where it abutted upon B. In an action by A. for a breach of this contract, he joined counts in tort, averring that they were for the same cause of action. *Held*, that under these counts A. could not show acts of B. done in regard to portions of A.'s roof not abutting on B. *Mason* v. *Field*, 585.

See INSURANCE, 12, 13; MALICIOUS PROSECUTION, 1; SHIP, 1; SLANDER; VARIANCE.

III. *Demurrer.*

See SLANDER, 3.

IV. *Motion to Dismiss.*

See COMPLAINT, 3.

V. *Answer.*

5. Under an answer denying each and every allegation in the plaintiff's declaration, the plaintiff is bound to make out his case; and all the facts necessary to be proved by him for this purpose are put in issue. *Hill* v. *Crompton*, 376.

6. The objection that a promissory note appears upon its face not to be negotiable, is open at the trial of an action thereon against the payee, in which the declaration sets out a copy of the note, and alleges that it was made payable to the payee or order, and indorsed by the payee to the plaintiff, and the answer denies all the allegations. *Stults* v. *Silva*, 137.

7. Under an answer to a declaration for rent due under a written lease, containing a general denial and alleging in avoidance that the plaintiff knowingly let the premises to be used for the illegal keeping and sale of intoxicating liquors, the defendant is not entitled to an instruction that if the plaintiff, after the letting, knowingly permitted the premises to be used for the purpose of illegally selling intoxicating liquors, or if after notice of that fact he permitted the defendant to use them for that purpose, he cannot recover. *Rice* v. *Enwright*, 187.

See CERTIORARI, 1; ERROR, 1; EVIDENCE, 6; PROMISSORY NOTE, 2.

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POOR DEBTOR.

Under the Gen. Sts. *c.* 124, § 13, one who is arrested on an execution in favor of a creditor, who does not reside or have a place of business in the county where the arrest is made, and who has no agent or attorney therein, may give notice of his intention to take the poor debtor's oath to the officer making the arrest; and the time for travel is to be determined by the distance between the place of service on the officer and the place of examination; and not by the distance at which the creditor or his attorney resides or does business therefrom. *Homer* v. *Sinnott*, 191.

See CONSTABLE.

PORT.

See SHIP, 7.

PRINCIPAL AND AGENT.

1. A. sent B. to do work for C., and A.'s bookkeeper, after the completion of the work, made out, in accordance with his duty, the bill therefor upon one of A.'s printed bill-heads, which he placed in the hands of B., who demanded and received payment for the work from C. Upon the bill-head was printed in fine type, "All moneys to be paid to the treasurer and bills to be receipted by him." *Held*, in an action by A. against C. to recover for the work, that, in the absence of evidence that C. saw these words, there was evidence of payment to go to the jury. *Kinsman* v. *Kershaw*, 140.

2. In an action to recover for the conversion of a part of the furniture in a hotel, it appeared that the defendant was the owner of the hotel, and that the plaintiff had succeeded to the title to the furniture, which C., who carried on business in the hotel, had. One witness testified that he bought all the property in the hotel; that he used it, and told C. that he could take away a certain portion of the furniture, but nothing else. It appeared that no obstacle was put by the defendant in the way of the removal of all the furniture in suit. *Held*, that in the absence of evidence that the witness acted as the agent of the defendant, or bought the property of him, the defendant was not liable. *Hewett* v. *Sessions*, 221.

See BILL OF EXCHANGE; INTOXICATING LIQUORS, 4; LAW AND FACT, 2 SHIP, 2

PRINCIPAL AND SURETY.

See BOND, 1, 2.

PROBATE COURT.

The jurisdiction of the Probate Court under the Gen. Sts. *c.* 117, § 5, to enforce the specific performance of a written agreement for the conveyance of real estate, is concurrent with that of this court under the Gen. Sts. *c.* 113, § 2, and is governed by the same rules. *Lynes* v. *Hayden*, 482.

See APPEAL, 1.

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PROMISSORY NOTE.

1. A promissory note containing a provision that it shall be payable "in one and a half years or sooner at the option of the mortgagor, from this date, with interest at the rate of seven per centum per annum during said term, and for such further time as said principal sum or any part thereof shall remain unpaid," is not negotiable, whether made by the mortgagor or by a third person. *Stults* v. *Silva*, 137.

2. In an action upon a promissory note, in which the declaration alleges that the defendant made the note, and the answer denies this and alleges an alteration, proof of the defendant's signature is *primâ facie* evidence that the whole body of the note written over it is the act of the defendant, but the burden of proof is on the plaintiff to show that the note declared on was the note of the defendant. *Simpson* v. *Davis*, 269.

3. A lease of rooms in a building, which provided that in case of the destruction of the premises by fire the rent should be suspended or abated, was surrendered to and accepted by the lessor in consideration of three notes made by the lessee payable to the lessor at different dates. The first two notes were duly paid, and before the last note was due, the premises were destroyed by fire. *Held*, that the lessee was liable for the amount of the last note when due. *Brooks* v. *Cutter*, 132.

4. In an action by the payee against the maker of a promissory note alleged to be dated July 1, 1869, for $1000 payable on demand, the evidence at the trial was that the plaintiff lent the defendant $1000 in July, in 1868 or 1869, and at the same time received from him a note, which had been lost and could not be produced. There was no evidence when the note was payable. *Held*, that the note might be presumed to be payable on demand, and that the evidence was sufficient, in the absence of evidence that any other note of that amount was ever given by the defendant to the plaintiff, to warrant the jury in returning a verdict for the plaintiff, and the court in rendering judgment in his favor, upon his filing a sufficient bond of indemnity. *Tucker* v. *Tucker*, 79.

See COMPOSITION, 1–3, 5; EVIDENCE, 18; INSURANCE, 1, 2; PARTNERSHIP, 1, 2; PAYMENT; PLEADING, 1, 6.

RAILROAD.

A railroad corporation, desiring to take lands outside the limits of its road, filed its location over a lot of land whose owner afterwards conveyed a part of the lot to the corporation. The county commissioners, subsequently, on the petition of the corporation, ordered that it have leave to take the land included within the location. *Held*, under the Gen. Sts. *c.* 63, § 19, providing that railroad corporations shall not take lands without the limits of their railroad without the consent of the owner, unless the county commissioners first prescribe the limits within which the same may be taken, that the corporation acquired no right in the land under its location; and that the corporation was bound, under the Gen. Sts. *c.* 63, § 43, to erect suitable

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fences between the land conveyed to it and the rest of the lot. *Derby* v. *Framingham & Lowel. Railroad*, 516.

See EVIDENCE, 10, 17; JURISDICTION; MASTER AND SERVANT, 4–6.

RECEIVER.

See EQUITY, 1; INSURANCE, 4.

RECOGNIZANCE.

On an indictment for perjury for swearing falsely when being examined under oath as bail for a person, who had been arrested on a complaint to a Municipal Court for an assault and battery upon a police officer, it appeared that the person arrested was ordered to recognize to appear before the Superior Court, and that he entered into a recognizance "to answer to said complaint for the crime aforesaid." *Held*, that the recognizance was valid, and bound the principal to appear before the Superior Court to answer to any indictment which might be substituted for the complaint. *Commonwealth* v. *Butland*, 317.

See CONSTABLE; POOR DEBTOR.

RECORD.

See ERROR, 2; EXCEPTIONS, 5.

RELIGIOUS SOCIETY.

See CHARITY, 1, 2.

REMAINDER.

See DEVISE AND LEGACY, 4.

RENT.

See FISHERY, 6; LEASE, 1, 2; PLEADING, 7; PROMISSORY NOTE, 3.

REPORT.

The Superior Court has no authority, under the St. of 1869, *c.* 438, to report a case before verdict to this court, for its opinion upon the whole course of the trial and upon the admissibility of every piece of evidence offered, without any ruling of the court below upon its competency, or stating that evidence with sufficient precision to enable its competency to be determined. *Russell* v. *Lathrop*, 531.

RESCUE.

See COMPLAINT, 5; INDICTMENT, 2.

ROBBERY.

See EVIDENCE, 7–9, 24.

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SALE.

The provision of the Gen. Sts. *c.* 49, § 131, that cities "may from time to time establish such ordinances as they deem expedient, with suitable penalties, respecting the appointment of surveyors of lumber therein," is not compulsory upon a city whose charter provides that it may establish such ordinances; and if such city fails to pass such ordinances, it still has the duty, under the Gen. Sts. *c.* 18, § 31, and *c.* 19, § 2, of appointing surveyors; and if, such ordinances not being passed, surveyors of lumber are yet appointed, and lumber is sold without being surveyed, numbered and marked, as required by the Gen. Sts. *c.* 49, § 143, the sale is void. *Prescott* v. *Battersby*, 285.

See STATUTE, 1.

SAVINGS BANK.

In an action against a savings bank, on an account annexed, to recover the amount of a deposit, the book of deposit is admissible in evidence at least to show the amount of the plaintiff's money received by the defendant, although the book contains printed conditions of deposit and payment. *Brown* v. *Abington Savings Bank*, 69.

See EVIDENCE, 18.

SEA SHORE.

See FLATS.

SEARCH WARRANT.

See GAMING; MUNICIPAL COURT OF THE CITY OF BOSTON.

SEISIN.

See DOWER.

SERVICE.

See APPEAL, 1; TRUSTEE PROCESS, 1, 2.

SET-OFF.

W. purchased of A. a claim against B., pending an action by A. upon the claim. B. had previously purchased a claim against A., and had given notice thereof to A. Suit was brought thereon by B. in the name of the assignor, in which W. appeared as adverse claimant of funds in the hands of B. summoned as trustee. At the time of his purchase of the first claim W. had no knowledge of the claim against A. *Held*, that judgment for the plaintiff in the second action could not be set off against judgment for the plaintiff in the first action. *Ames* v. *Bates*, 397.

SEWER.

See COVENANT, 1.

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SHIP.

1. The mortgagee of a vessel, who is in possession, and to whom supplies for the use of the vessel have been furnished, under such circumstances that he is liable for them, is properly described as owner in the declaration in an action to recover for the supplies. *Luce* v. *Hadley*, 229.

2. The owner of a vessel chartered it, retaining the necessary room for the crew, to A. to bring a cargo to the port of B. or the port of G., the port to be named before clearing. A. named B. as the port and the vessel sailed on said voyage. Subsequently an agreement was made between the owner and A. by which A. was to pay all extra charges incurred if he should elect to have the destination of the vessel changed from B. to G. Before the vessel arrived at G., a letter was sent by A. without the knowledge of the owner of the vessel, to the office of the pilots in B., directed to the master of the vessel, requesting him to go to G. This letter was delivered at sea to the master by a pilot, and an agreement was made by which the pilot was to receive for taking the vessel to G. as much as he would have been entitled to as pilotage, if he had taken the vessel to B. This was paid. The pilot then brought an action against the owner of the vessel to recover compensation for taking the letter to the master, and at the trial put in evidence of a local usage in the port of B. for pilots to charge and receive a pilotage fee for delivering such a letter to the master of a vessel. The judge instructed the jury that in order to charge the defendant they must find that either the owner or master had knowledge of the usage, and that if they should find that either had such knowledge and should find the usage to be proven they must find for the plaintiff. *Held*, on exceptions taken by the defendant, that the contract relied on, if proved, was within the scope of the master's authority and would bind the owner; and that the contract between the owner and the charterer in respect to paying for extra charges, in case of a change of port, did not affect the defendant's liability to the plaintiff. *Held*, *also*, that knowledge of the usage, on the part of the master, must be shown, and that it was not enough to show that the defendant had knowledge of the usage. *Held*, *also*, on the issue whether an implied contract was to be inferred from the act of the master in going to G., that the contract made between him and the pilot, about taking the vessel in, might have a material bearing. *Fowler* v. *Pickering*, 33.

3. Under the St. of 1855, *c.* 231, no lien can be claimed for lumber furnished for the construction of a vessel, which has not been used in her construction, or fitted and prepared for that purpose. *Young* v. *The Orpheus*, 179.

4. Neither the fact that materials are furnished for the construction of a vessel on credit, nor the fact that they are delivered primarily on the credit of the builder of the vessel, defeats a lien under the St. of 1855, *c.* 231, if no note or security is taken, and exclusive credit is not given to the builder. *Ib.*

5. Under the St. of 1855, *c.* 231, § 2, a lien, for materials used in the construction of a vessel, is not dissolved by a clerical error, in the certificate filed in the office of the town clerk, in adding up the items of the account,

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which themselves clearly show the amount of the demand claimed and actually due. Nor is such lien dissolved by the including in the certificate of materials furnished for the vessel, but for which no lien in fact exists, they not having been used in her construction. *Young* v. *The Orpheus*, 179.

6. Under the St. of 1855, *c.* 231, § 2, declaring that a lien on a vessel shall be dissolved unless a certificate is filed "within four days from the time such ship or vessel shall depart from the port at which she was when the debt was contracted," the certificate may be filed before the vessel departs from the port. *Ib.*

7. The port of Boston is not limited to the municipal limits of Boston, but includes the opposite shore of Chelsea; and under the St. of 1855, *c.* 231, § 2, declaring that a lien on a vessel shall be dissolved unless a certificate is filed "within four days from the time such ship or vessel shall depart from the port at which she was when the debt was contracted, in the office of the clerk of the city or town within which such ship or vessel was at the time the debt was contracted," a vessel does not depart from the port by leaving, in an unfinished condition, the town of Chelsea, where she was when the debt was contracted, and going to Boston; and a certificate filed in Chelsea more than four days after such leaving, and before she leaves Boston, is seasonably filed. *Ib.*

8. A vessel sailed from Boston in March, 1856, and did not return to any port of this Commonwealth until July, 1871, when a petition was filed to enforce a lien for a debt contracted shortly before her departure. The vessel had in the mean time been in different ports of the United States, and her arrival there was announced in the usual manner, but there was no evidence that the petitioner had actual notice thereof. *Held*, under the St. of 1855, *c.* 231, § 1, declaring that the lien "shall continue until the debt is satisfied," that the petition was seasonably filed, although her ownership had been changed. *Ib.*

9. On a petition to enforce a lien on a vessel under the St. of 1855, *c.* 231, if interest is not due as part of the debt, but as damages only, it is to be computed from the filing of the petition, and not from the time of a prior demand; and the fact that, before bringing the petition, proceedings were had in a court of the United States, which were dismissed for want of jurisdiction, makes no difference. *Ib.*

See EVIDENCE, 2.

SLANDER.

1. A declaration for slander which alleges, in the form prescribed by the Gen. Sts. *c.* 129, that the defendant charged the plaintiff with a certain crime "by words spoken of the plaintiff substantially as follows," is supported by proof that the defendant spoke words substantially, though not precisely like those set out in the declaration. *Chace* v. *Sherman*, 387.

2. A declaration for slander alleged that the defendant charged the plaintiff with burning his own mill, with the intent to defraud the insurers thereof,

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"by words spoken of the plaintiff substantially as follows: He (meaning the plaintiff) burned it (meaning the said mill) because he was poor and wanted the money." At the trial there was evidence that the defendant charged the plaintiff with burning his own mill "to get his insurance." *Held*, that words were proved "substantially" as alleged, under the Gen. Sts. *c.* 129. *Held*, *also*, that the objection that the declaration did not show that the defendant charged the plaintiff with a crime, could be taken only by demurrer. *Chace* v. *Sherman*, 387.

3. A declaration for slander alleged that the defendant accused the plaintiff, by certain words, which were set forth, of burning his own building with intent to defraud the insurers thereof. The defendant's answer contained a general denial, and alleged that "there are no sufficient allegations in said plaintiff's writ and declaration of any matter or thing to constitute the substance of slander in form and manner." *Held*, that, if the answer contained a demurrer, it could not first be treated as such in this court. *Ib.*

SPECIFIC PERFORMANCE.

A. by an instrument in writing agreed to convey to B. "from 26,000 to 28,000 feet of land, situated on Walden Street and Vassal Lane, in Cambridge, when the bounds are fixed and the street laid out." The street last referred to was not laid out or the bounds fixed during A.'s lifetime. *Held*, that the agreement was too indefinite to be enforced under the Gen. Sts. *c.* 117, § 5, after A.'s death. *Lynes* v. *Hayden*, 482.

See PROBATE COURT.

STATUTE.

1 The St. of 1875, *c.* 155, applies only to sales of goods, wares and merchandise, by weights and measures, and not to sales of lumber. *Prescott* v. *Battersby*, 285.

2. The St. of 1875, *c.* 68, providing that "whenever any defendant in a civil action dissolves an attachment made in said suit, by giving bond as provided by the statutes of this Commonwealth, and has already been or afterwards is adjudged a bankrupt," the court may enter a special judgment applies only to cases where bonds to dissolve attachments are given after the statute went into operation. *Fickett* v. *Durham*, 159.

See CHARITY, 2; FISHERY, 5.

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STREET RAILWAY.

See Evidence, 10.

SUPERIOR COURT.

See Bastardy Process, 4; Exceptions, 9, 10; Report.

SUPREME JUDICIAL COURT.

On a writ of error to reverse a judgment of the Superior Court, the error assigned being the disallowance of exceptions, taken by the plaintiff in error in an action of contract brought against him in that court, because not presented to the judge within the time required by law, whereas, as it was alleged, the record showed that they were presented in time, the question arising on the record is an issue of law, which a single justice of this court cannot try or reserve, but which is within the exclusive jurisdiction of the full court. *Tufts* v. *Newton*, 476.

See Report.

TAX.

See Action, 3; Equity, 6.

TENDER.

See Composition, 5.

TIDE WATER.

See Flats.

TOWN.

See Action, 3; Certiorari, 3, 4; Charity, 3–5; Exceptions, 21; Fishery, 4; Pauper; Trustee Process, 1; Way.

TRAVELLER.

See Way, 10, 11.

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TRESPASS.

See MORTGAGE, 3.

TROVER.

See ACTION, 5.

TRUST AND TRUSTEE.

Where a person, who has entered into a written contract for the purchase o and, has paid or tendered the consideration, and by the owner's permission has entered upon the land and made improvements thereon, the land is charged with an implied trust in his favor; and a court of equity may, if the owner has never been a resident of this state, and no service is made upon him here, appoint a trustee, under the Gen. Sts. *c.* 100, § 15, to convey the same in such manner as it may require. *Felch* v. *Hooper*, 52.

See CHARITY; DEVISE AND LEGACY, 2, 4, 5; EQUITY, 7.

TRUSTEE PROCESS.

1. Under the Gen. Sts. *c.* 142, § 5, providing that trustee processes shall be served on the defendant and each of the trustees in the manner prescribed for the service of an original summons without an attachment, and *c.* 123, § 22, providing that in any action brought against a city or town the writ shall be served thirty days at least before the return day; a city cannot be summoned as trustee less than thirty days before the return day. *Harris* v. *Doherty*, 142.
2. Where an action is begun by trustee process and the writ is not legally served upon the trustee, the plaintiff may, under the Gen. Sts. *c.* 142, § 7, proceed with the suit against the principal defendant, if he has been legally served. *Ib.*
3. If a day laborer works for a corporation under an agreement, by which the amount to become due him monthly is paid in advance to a third person, who is to account to the laborer for it at the end of each month, the corporation is not liable in a trustee process to a creditor of the laborer, although the third person to whom the money is paid is the treasurer of the corporation. *Callaghan* v. *Pocasset Manuf. Co.* 178.
4. A. delivered to B. a certificate of stock in a corporation as collateral security for a debt. B. thereupon surrendered the certificate to the corporation, and took out a new certificate in his own name as trustee. A. paid the debt, and B. delivered the certificate to A. and gave him a power of attorney, irrevocable in its terms, but not naming any attorney, to transfer the stock. After this, and before the stock was transferred on the books of the corporation, B. was summoned as trustee of A. in a process of foreign attachment. *Held*, that he could not be charged. *Cooke* v. *Hallett*, 148.
5. A., by an instrument in writing and duly recorded, assigned to B. on December 13, 1873, "all claims and demands which I now have, and all which at any time between the date hereof and the first day of February, 1875,

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may and shall have against C., for all sums of money due, and for all sums of money and demand, which at any time between the date hereof and the said first day of February, 1874, may and shall become due to me as laborer." *Held*, on a trustee process served after February, 1874, and before February, 1875, that the assignment was not void on its face, but applied to all wages until February 1, 1875. *Schofield* v. *McConnell*, 868.

6. A. being indebted to B. and other creditors, assigned to B., by an instrument duly recorded, his wages due and to become due from C., until a certain date, B. having at the time knowledge of the other debts. B. received the wages monthly, and applied part of them to his debt and part, at A.'s request, for necessaries for A.'s support, he having no other means of subsistence. At the time of a trustee process, brought by one who was a creditor of A. when the assignment was made, against A., in which C. was summoned as trustee, and B. appeared as claimant, it appeared that money was still due from A. to B., although B. had received money enough, had he so applied it to pay his own debt. It was found as matter of fact that the assignment and the subsequent arrangements between A. and B. were not made with any intent on their part to defraud the creditors of A. *Held*, on a bill of exceptions setting forth the above facts, that the court could not say as matter of law that the assignment was fraudulent. *Held, also*, the appropriations made by the parties being valid, that the law of appropriation of payments, applicable when no appropriations are made by the parties, did not apply. *Ib.*

See COSTS, 2; EXCEPTIONS, 7; MORTGAGE, 8.

USAGE.

See EXCEPTIONS, 20; SHIP, 2.

VARIANCE.

In an action for work and materials furnished by the plaintiff to the defendant, the judge who tried the case without a jury found as matters of fact that the plaintiff did not prove the contract declared on; and that, there being conflicting evidence upon the question whether the defendant promised to see him paid for work and materials which he originally agreed to furnish to another person, the liability of the original debtor was not extinguished, and ordered judgment for the defendant. *Held*, the findings of fact not being subject to revision in this court, that the judge rightly ruled as matter of law that such promise would not support the declaration. *Hogan* v. *Coleman*, 96.

See PERJURY, 3.

VERDICT.

See EXCEPTIONS, 8, 16; NEW TRIAL; WAY, 5.

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WAIVER.

See CONTRACT, 9; DEVISE AND LEGACY, 5; MORTGAGE, 2; WIDOW.

WATERWORKS.

See EMINENT DOMAIN; EXCEPTIONS, 9.

WAY.

1. The posting by the selectmen of a town of a notice of their intention to lay out a town way, as required by the Gen. Sts. *c.* 43, § 61, is a sufficient notice under that section to the owner of the land taken, though a resident of the town, if such ownership be not known to the selectmen. *Healey* v. *Newton*, 480.

2. If a city passes an order reducing generally the grade of a street, and afterwards passes another order for the construction of sidewalks in the street, the owner of land adjoining the street, and injured by the change of grade, may, upon a petition under the Gen. Sts. *c.* 44, § 19, filed within one year from the time when the sidewalk in front of his premises was brought to its final grade, recover for all damage done by the change of grade. *Barker* v. *Taunton*, 392.

3. Where, at the trial for the assessment of damages sustained by the change of grade in a street, the city introduces evidence that the changes made, including the petitioner's own improvements, had increased by a given sum the value of the premises, it is competent for the petitioner to show how much he has expended in improvements upon the premises since the change of grade. *Ib.*

4. It is no bar to a petition for the assessment of damages, sustained by the change of grade in a street, that the petitioner was one of the original petitioners for the improvements. *Ib.*

5. Land was taken for the alteration of a highway by the mayor and aldermen of a city, who awarded the petitioner $2000 as damages. The owner being dissatisfied with the award applied for a jury, who at the trial were directed to add interest from the time of the taking of the land upon the amount of damages found by them to have been thereby occasioned to the petitioner's estate, and to return the amount of damages and interest in one sum. The jury returned a verdict, that "they estimate and assess the amount of damages sustained by the petitioner at the sum of $2166.75." *Held*, that the jury must be presumed to have followed the direction to them, and that the damages awarded by the mayor and aldermen were not increased so as to entitle the petitioner to costs under the Gen. Sts. *c.* 43, § 73. *First Baptist Society* v. *Fall River*, 95.

6. The erection of railings or barriers, required for the safety of public travel, is not essential to the completion of a public way under the St. of 1871, *c* 382, § 1; and the want thereof does not prevent the assessment of betterments under that section. *Chase* v. *Aldermen of Springfield*, 556.

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7. The record of the board of city or town officers of their proceedings in the laying out or altering of a way and the assessment of betterments therefor, under the St. of 1871, *c.* 382, should show the amount of the expense of the laying out or altering, as well as of the assessment. *Chase* v. *Aldermen of Springfield*, 556.

8. At the trial upon a petition to the Superior Court, for a jury to assess the damages caused to the petitioner's estate by raising the grade of a highway it appeared that the petitioner, in anticipation of the change of grade, had built foundation walls to a height of about six feet above the old grade, and that the new grade was established two or three feet higher than the petitioner anticipated. The petitioner was then permitted, against the respondent's objection, to introduce evidence in relation to putting the property in the same position relatively as before, and the expense thereof. The judge admitted the evidence subject to instructions that that would be a mode of determining the damages, provided that would be the course which a prudent man would adopt in relation to property in that condition, provided such expenditures were the most economical way of diminishing the damages caused by the change of grade; that it was for the jury to decide what course a prudent man would adopt in relation to such property after the location and change of grade; and that the damages awarded the petitioner were in no event to exceed the amount of the diminution in the value of the petitioner's property owing to the laying out of the street and the change of the grade. *Held*, that the evidence was rightly admitted, and that the instructions were correct. *Buell* v. *County of Worcester*, 372.

9. A town, within the limits of which existing public ways have been changed by the county commissioners, for the accommodation of a milldam, under the St. of 1873, *c.* 144, and which has no ownership in the soil of such ways, does not come within the provisions of § 2, as a person or corporation that has sustained damages by reason of the alterations, changes of grade or repairs in such ways; and the objection that such damages cannot be assessed may be taken at the trial before a sheriff's jury summoned to assess the damages. *Cheshire* v. *Adams & Cheshire Reservoir Co.* 356.

10. One who, being upon a highway merely for play, meets with an injury occasioned by a defect therein, cannot maintain an action for damages therefor against the city or town bound to keep the highway in repair for travellers. *Tighe* v. *Lowell*, 472.

11. A child injured, while sitting upon the sidewalk of a public highway, by the falling upon her of a stone left there to be used as a curb-stone, is not a traveller upon the highway. *Lyons* v. *Brookline*, 491.

12. A town which places stones insecurely in a highway is not liable to a person injured by one of the stones falling upon him, the fall being caused by the act of a third person. *Ib.*

13. In an action against a city to recover for injuries occasioned by a defective highway, evidence that a boy sixteen years old, who had been employed to light and extinguish the street lamps, and had received a general direction from his superior to shut off the gas at midnight, was told of the existence

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of the defect just before the accident, and as he was in the act of extinguishing the lights, and that, although warned, he put out the lights and neglected to barricade the spot, will not warrant the jury in finding that the city had notice of the defect. *Monies* v. *Lynn*, 273.

4. In an action against a city for injuries occasioned by a defective highway, if it appears that the plaintiff was driving at the time, and that there is an ordinance of the city prohibiting the driving of a vehicle in the streets of the city at a greater rate of speed than six miles an hour, the burden of proof is on the plaintiff, upon the issue of due care, to show that at the time of the injury he was not violating the ordinance. *Tuttle* v. *Lawrence*, 276.

15. In an action against a town to recover for injuries occasioned by a defective highway, there was evidence tending to show that at the time of the accident, the plaintiff was driving in a carryall; that suddenly the horse stopped, jumped aside, cramped the nigh wheel and began to back; that the plaintiff jumped out and was injured, the horse going over an embankment; that the horse driven by him was one of a span of team horses, and had been accustomed to draw on the nigh side in double harness, and that he had never been driven in the same carryall, but had been driven in single harness. The defendant asked the judge to instruct the jury that if the horse was most usually driven in double harness and on the nigh side, and, from the habit of taking the nigh rut, turned to the left and cramped the wheel and began to back, and the plaintiff jumped out instantly upon the cramping of the wheel, the plaintiff cannot recover for any injury sustained from the jumping out. The judge declined to give this instruction except with the qualification, "unless the act was done under a reasonable apprehension that the carriage would go over the bank." *Held*, that the defendant had no ground of exception. *Williams* v. *Leyden*, 237.

6. In an action against a town to recover for injuries caused by a defective highway, which the town was bound to keep in repair, one of the plaintiffs, who were riding together in their carriage in the daytime, testified that the defect was a hole in the way, caused by the dropping down of the capstone of a culvert, that the other plaintiff was driving, and that he was not at the time looking ahead, but was looking as any other person would who was driving in a carriage. The plaintiff who was driving testified that she had no previous knowledge of the defect, that the horse was gentle and was walking at the time, and that she was then looking straight ahead. The evidence also showed that the road was rough, that there was mud and water upon it, and that there was room to pass safely upon the side of the way. One witness for the plaintiff testified that any one who was on the lookout could have seen the hole. The presiding judge, at the defendant's request, instructed the jury in substance, that if the plaintiffs in the daytime, and at a walk upon a broad and substantially level road, with ample width for passing by the hole, went into it, when it was conspicuous, obvious and in plain sight, they were not in the exercise of due care, unless they show some excuse for their inattention to their track; and that the law requires of one riding in the daytime such attention to the road over which he

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is about to pass, as to see large holes that are conspicuous, obvious and in plain sight, unless some sufficient reason excuses the inattention, and refused to give the further instructions requested by the defendant, that no such excuse was offered or shown by the evidence in this case, and that there was no evidence in the case of due care on the part of the plaintiffs, or either of them. The judge, at the request of the plaintiffs, also instructed the jury that it was enough if the plaintiffs looked ahead in such a manner as persons of ordinary prudence usually do in riding upon a highway. The jury found for the plaintiffs. *Held*, that the last instruction was correct, that the other instructions were sufficiently favorable to the defendant, and that the case was rightly submitted to the jury. *Hill* v. *Seekonk*, 85.

17. In an action against a town for personal injuries caused by a defect in a foot-path, by the side and within the location of a highway, instructions were requested that the jury could not find "merely" from certain specified circumstances that the town had recognized the path as a part of the highway that they were bound to keep in proper condition for travel. *Held*, that such instructions were properly refused; and that the recognition and adoption of the path by the town was a question of fact for the jury to determine, in view of all the evidence in the case. *Whitford* v. *Southbridge*, 564.

18. A person knowing the unsafe condition of a part of a foot-path by the side of a highway in a town, fell and was injured in the attempt to pass over it. In an action brought against the town for the injuries caused by the alleged defect, the defendant requested the judge to instruct the jury that the plaintiff's election, with such knowledge, to travel along the path instead of by the safe portion of the way might be considered by them as such want of due care upon her part as would prevent her recovering. The judge ruled that such knowledge would not be conclusive that the plaintiff did not exercise due care; but that if, with her knowledge, the plaintiff did not exercise due care and prudence, either in entering upon the way or in proceeding thereon after she had entered, she could not recover. *Held*, that this ruling properly left the jury to determine whether there was any want of due care in going upon the foot-path. *Ib.*

See ACTION, 1, 2; CERTIORARI, 2–4; DAMAGES, 2; DEED, 3, 7–13; EVIDENCE, 15, 16, 22; EXCEPTIONS, 11, 13, 14, 21; JURISDICTION; NEGLIGENCE; NEW TRIAL.

WIDOW.

A testator left property in trust to pay one third the income to his widow for life, and the other two thirds to his daughters, and in case of the death of either daughter, her share was to be paid to her heirs. The widow waived the provisions of the will, under the St. of 1861, c. 164. *Held*, on the death of a daughter, that the widow, although an heir of the daughter, could take no beneficial interest, as such heir, under the will. *Upham* v. *Emerson*, 509.

See DEVISE AND LEGACY, 5.

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WITNESS.

See EVIDENCE, 11, 24, 26.

WORDS.

"Attested." See *Wait* v. *Demeritt*, 158.
"Bequeathed." See *Laing* v. *Barbour*, 523, 525.
"Depart." See *Young* v. *The Orpheus*, 179, 185.
"Fitting up." See *Pratt* v. *Paine*, 439, 446.
"Greater part in interest." See *Henry* v. *Thomas*, 583.
"Legatee." See *Laing* v. *Barbour*, 523, 525.
"Manner." See *Harris* v. *Doherty*, 142, 143.
"Occupancy." See *Cunningham* v. *Washburn*, 224, 227.
"Property." See *Laing* v. *Barbour*, 523, 525.
"Within." See *Young* v. *The Orpheus*, 179, 185.

WORK AND LABOR.

See MASTER AND SERVANT, 1–3; PRINCIPAL AND AGENT, 1; VARIANCE.

WRIT.

See TRUSTEE PROCESS, 1, 2.

WRIT OF ENTRY.

See DEED, 2; EQUITY, 4; EXCEPTIONS, 12.

WRIT OF ERROR.

See ERROR.

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